

**1979 REPORT
ADMINISTRATIVE
CONFERENCE
OF THE UNITED STATES
APRIL 1980**

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
OFFICE OF THE CHAIRMAN
WASHINGTON, D.C.

April, 1980

TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES:

I have the honor to transmit herewith the 1979 Report of the Administrative Conference of the United States.

This report describes the significant activities of the Administrative Conference for the twelve month period from January 1, 1979, through December 31, 1979.

Respectfully,

Stephen L. Babcock
Executive Director

COUNCIL MEMBERS

MARGARET A. McKENNA, Acting Chair, Deputy Counsel to the President.

JOAN Z. BERNSTEIN, General Counsel, Department of Health and Human Services.

WALTER GELLHORN, professor of law, Columbia University School of Law.

IRA M. MILLSTEIN, lawyer, New York, N.Y.

EDWARD C. SCHMULTS, lawyer, New York, N.Y.

MICHAEL N. SOHN, General Counsel, Federal Trade Commission.

OTIS M. SMITH, vice president and general counsel, General Motors Corp., Detroit, Mich.

RICHARD C. VAN DUSEN, lawyer, Detroit, Mich.

FORMER MEMBERS OF THE COUNCIL

Who Served During the Period of this Report

ROBERT A. ANTHONY, Chairman.

MICHAEL J. EGAN, lawyer, Washington, D.C.

BETTY SOUTHARD MURPHY, lawyer, Washington, D.C.

MICHAEL PERTSCHUK, Chairman, Federal Trade Commission.

MEMBERS OF THE CONFERENCE

The following list contains the names and affiliations of each member of the Conference (other than members of the Council) as of December 31, 1979:

WILLIAM H. ALLEN, lawyer, Washington, D.C.
WILEY A. BRANTON, Dean, Howard University School of Law, Washington, D.C.
ton, D.C.
PETER A. BRADFORD, Commissioner, Nuclear Regulatory Commission.
WILEY A. BRANTON, Dean, Howard University School of Law, Washington, D.C.
ROBERT R. BRUCE, General Counsel, Federal Communications Commission.
CLARK BYSE, professor, Harvard Law School, Cambridge, Mass.
BETTY Jo CHRISTIAN, Commissioner, Interstate Commerce Commission.
DAVID A. CLANTON, Commissioner, Federal Trade Commission.
CARIN A. CLAUS, Solicitor of Labor, Department of Labor.
TIMOTHY F. CLEARY, Chairman, Occupational Safety and Health Review Commission.
SHELDON S. COHEN, lawyer, Washington, D.C.
N. JEROLD COHEN, Chief Counsel, Internal Revenue Service.
LYNN R. COLEMAN, General Counsel, Department of Energy.
JEROME A. COOPER, lawyer, Birmingham, Ala.
RICHARD M. COOPER, Chief Counsel, Food and Drug Administration.
LOUIS A. COX, General Counsel, U.S. Postal Service.
CHARLES B. CURTIS, Chairman, Federal Energy Regulatory Commission.
RICHARD J. DASCHBACH, Chairman, Federal Maritime Commission.
KENNETH CULP DAVIS, professor, University of San Diego School of Law, San Diego, Calif.
ROBERT G. DIXON, JR., professor, Washington University School of Law, St. Louis, Mo.
HARRY T. EDWARDS, professor, University of Michigan Law School, Ann Arbor, Mich.
FREDRICK N. FERGUSON, Deputy Solicitor, Department of the Interior.
JAMES F. FLUG, lawyer, Washington, D.C.
WILLIAM RAY FORRESTER, professor, University of California, Hastings College of Law, San Francisco, Calif.
HERSCHEL H. FRIDAY, lawyer, Little Rock, Ark.
ROBERT L. GILLIAT, Assistant General Counsel, Department of Defense.
WAYNE G. GRANQUIST, Associate Director, Office of Management and Budget.
JACK GREENBERG, Director-Counsel, NAACP Legal Defense and Educational Fund, New York, N.Y.
DARREL J. GRINSTEAD, Assistant General Counsel, Department of Health and Human Services.
WOLF HABER, Assistant General Counsel, Department of the Treasury.
JOHN N. HARMON, Assistant Attorney General, Office of Legal Counsel, Department of Justice.
JOHN IZARD, lawyer, Atlanta, Ga.

RONALD J. JAMES, lawyer, Cleveland, Ohio.
 HOWARD JENKINS, JR., Member, National Labor Relations Board.
 LINDA HELLER KAMM, General Counsel, Department of Transportation.
 RHODA H. KARPATKIN, Executive Director, Consumers Union, Mount Vernon, N.Y.
 CORNELIUS B. KENNEDY, lawyer, Washington, D.C.
 EARL W. KINTNER, lawyer, Washington, D.C.
 NORMAN D. KLINE, Administrative Law Judge, Federal Maritime Commission.
 ALLIE B. LATIMER, General Counsel, General Services Administration.
 DANIEL E. LEACH, Vice Chairman, Equal Employment Opportunity Commission.
 HANS A. LINDE, Associate Justice, State of Oregon Supreme Court, Salem, Ore.
 PHILIP A. LOOMIS, JR., Commissioner, Securities and Exchange Commission.
 K. E. MALMBORG, Assistant Legal Advisor, Department of State.
 DANIEL MARCUS, General Counsel, Department of Agriculture.
 DUDLEY D. McCALLA, lawyer, Austin, Tex.
 MARY A. McINNIS, General Counsel, Civil Aeronautics Board.
 JANE MCGREW, General Counsel, Department of Housing and Urban Development.
 GUY H. McMICHAEL III, General Counsel, Veterans Administration.
 ALFRED MEISNER, Assistant General Counsel, Department of Commerce.
 JOHN R. MEYER, professor of economics, Harvard University, Boston, Mass.
 MILAN MISKOVSKY, General Counsel, Federal Home Loan Bank Board.
 ANTHONY L. MONDELLO, lawyer, Bethesda, Md.
 WILLIAM E. MURANE, lawyer, Denver, Colo.
 CONSTANCE B. NEWMAN, consultant, Washington, D.C.
 EDWARD W. NORTON, General Counsel, Small Business Administration.
 OWEN OLPIN, lawyer, Los Angeles, Calif.
 CLARK H. ONSTAD, Chief Counsel, Federal Aviation Administration.
 MAX D. PAGLIN, lawyer, Washington, D.C.
 WILLIAM F. PEDERSEN, Deputy General Counsel, Environmental Protection Agency.
 NEAL L. PETERSEN, General Counsel, Board of Governors of the Federal Reserve System.
 JOHN W. PETTIT, lawyer, Washington, D.C.
 RICHARD W. POGUE, lawyer, Cleveland, Ohio.
 KATHERINE E. SASSEVILLE, Chairman, Minnesota Public Service Commission, St. Paul, Minn.
 ANTONIN SCALIA, professor, University of Chicago Law School, Chicago, Ill.
 FRANK M. SKILLERN, General Counsel, Federal Deposit Insurance Corporation.
 EILEEN M. STEIN, General Counsel, U.S. Commission on Civil Rights.
 ROBERT THOMAS THOMPSON, lawyer, Greenville, S.C.
 ROBERT O. TIERNAN, Chairman, Federal Election Commission.
 ROBERT L. TRACHTENBERG, Acting Deputy Administrator, Department of Health and Human Services.
 MARGERY WAXMAN, General Counsel, Office of Personnel Management.
 JAMES E. WESNER, lawyer, Washington, D.C.
 RICHARD E. WILEY, lawyer, Washington, D.C.
 FRANK M. WOZENCRAFT, lawyer, Houston, Tex.
 DAVID J. YERES, Counsel to the Chairman, Commodity Futures Trading Commission.
 SAM ZAGORIA, Commissioner, Consumer Product Safety Commission.

The following list contains the names and affiliations of liaison members of the Conference as of December 31, 1979:

CLYDE S. DUPONT, Commissioner, Postal Rate Commission.
 ERNEST J. GALDI, Acting Director, Office of the Federal Register.

CARL MCGOWAN, Judge, U.S. Court of Appeals, Washington, D.C.
WILLIAM J. O'BRIEN, Administrative Law Judge, the Administrative Law Judges Conference, Washington, D.C.
ALICE L. O'DONNELL, Director of Inter-Judicial Affairs, the Federal Judicial Center.
PETER J. PETKAS, Director, U.S. Regulatory Council.
ERSA HINES POSTON, Vice Chair, Merit Systems Protection Board.
MILTON J. SOCOLAR, General Counsel, General Accounting Office.
JOSEPH F. SPANIOL, JR., Deputy Director, Administrative Office of the United States Courts.
HENRY N. WILLIAMS, General Counsel, Selective Service System.

FORMER MEMBERS OF THE CONFERENCE

The following list contains the names of former members who served during the period of this report, with their affiliation at the time of membership:

RICHARD BACA, General Counsel, U.S. Commission on Civil Rights.
PHILIP J. BAKES, JR., General Counsel, Civil Aeronautics Board.
KARL E. BAKKE, Commissioner, Federal Maritime Commission.
RICHARD I. BEATTIE, General Counsel, Department of Health, Education and Welfare.
JAN W. BARAN, Office of the Chairman, Federal Election Commission.
HAROLD M. CARTER, Assistant General Counsel, Department of Agriculture.
BETTY B. FLETCHER, lawyer, Seattle, Wash.
WILLIAM T. GENNETTI, General Counsel, Small Business Administration.
A. STEPHAN GORDON, Chief Administrative Law Judge, Department of Labor.
WILLIAM M. ISAAC, Director, Federal Deposit Insurance Corporation.
ANNE P. JONES, General Counsel, Federal Home Loan Bank Board.
VILMA S. MARTINEZ, President, Mexican American Legal Defense and Educational Fund, San Francisco, Calif.
MALCOLM S. MASON, Chairman, Grant Appeals Board, Department of Health, Education, and Welfare.
TURNER H. McBAINE, lawyer, San Francisco, Calif.
WILLIAM M. NICHOLS, General Counsel, Office of Management and Budget.
ELEANOR HOLMES NORTON, Chair, Equal Employment Opportunity Commission.
THOMAS J. O'CONNELL, Counsel to the Chairman, Board of Governors of the Federal Reserve System.
RUTH T. PROKOP, General Counsel, Department of Housing and Urban Development.
GARY L. SEEVERS, Vice Chairman, Commodity Futures Trading Commission.
STUART E. SEIGEL, Chief Counsel, Internal Revenue Service.
H. PATRICK SWYGERT, General Counsel, U.S. Civil Service Commission.

STAFF OF THE OFFICE OF THE CHAIRMAN

STEPHEN L. BABCOCK
Executive Director

RICHARD K. BERG
Executive Secretary

JAMES V. DELONG
Research Director

JEFFREY S. LUBBERS
Senior Staff Attorney

DAVID M. PRITZKER
Staff Attorney

MICHAEL W. BOWERS
Staff Attorney

CHARLES POU, JR.
Staff Attorney

SHARON ANDERSON
EUNICE M. BUTLER
MARGARET A. JACKSON
JAMES H. KINSEY, JR.

SARAH G. FLANAGAN
Staff Attorney

LINDA A. SEDIVEC
Staff Attorney

WILLIAM C. BUSH
Staff Attorney

CHARLES R. POUNCY
Staff Attorney

KATHERINE E. KLEIN
Administrative Assistant to the Chair-
man

NORMA B. SMITH
Administrative Officer

SUE J. BOLEY
Librarian and Information Officer

BETTY M. PALMER
PAMELA WHITE
THERESA C. YOUNG



Chairman Robert A. Anthony, at the Nineteenth Plenary Session, addressing the Assembly.

EXECUTIVE DIRECTOR'S FOREWORD

On October 29th, Robert A. Anthony, who had so ably led the Conference for five years, resigned to enter private practice. The Council, in a resolution adopted at its next meeting, expressed its views—shared, I am sure, by all of our members, as well as the staff of the Office of the Chairman—in the following terms:

Robert A. Anthony became Chairman of the Administrative Conference of the United States in August of 1974. He continued in that post for the full statutory term of five years, serving for a longer period than any predecessor. Throughout his chairmanship he led the Conference's activities with vigor, imagination, and grace. The scope of the Conference's studies was constantly broadened under his direction, and the recommendations that emerged from them were markedly influential. The Conference's success in stimulating improved administrative procedures led to its being consulted frequently by legislative bodies as well as by administrative agencies that sought advice about sound methods. Chairman Anthony was the Conference's accomplished spokesman in dealing with other governmental authorities. In informal as well as formal discussions he extended the Conference's influence far beyond the reach of the printed page.

We who have served with Bob Anthony as members of the Council of the Administrative Conference acknowledge the appreciation, admiration, and affection that have been aroused in us by his wise chairmanship. We join now in wishing him well as he enters upon a new phase of his distinguished professional career.

This resolution adopted by the Council at its meeting in Washington, District of Columbia, on November 19, 1979.

Because of the length of his service, his dedication to the mission of the Conference and his strong intellect, Chairman Anthony's departure was a substantial loss. But the Conference was wisely constituted by the Congress as a membership body; and its real strength lies in the varying perspectives and experience of those ninety members.

In proof of this, the members assembled in December, and, capably led by Vice Chair Margaret A. McKenna, considered and adopted three recommendations, three resolutions and a bylaw amendment, all

of which are described in this report. At the year's end, Committee Chairmen, assisted by their staff liaisons, were engaged in planning their Spring agendas, looking toward the Twenty-first Plenary Session to be held in June of 1980.

When the new Chairman is chosen and confirmed, he or she will find an ongoing organization that is able to continue to play its role in increasing the efficiency, adequacy, and fairness of Federal administrative procedure.

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ORGANIZATION AND OPERATION OF THE CONFERENCE

The Administrative Conference of the United States was established as a permanent independent Federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§ 571-576) and was activated by the appointment of its first Chairman in January 1968. Its purpose is to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress, and the courts.

The statutory provisions governing the organization and operation of the Conference are set forth at the end of this report. The Conference consists of three entities—the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is appointed by the President, with the advice and consent of the Senate, for a term of 5 years. The Chairman is the chief executive of the Conference and its only full-time compensated member.

The Chairman, with the approval of the Council, appoints the public members of the Conference. The Chairman presides at plenary sessions of the Assembly and at Council meetings. The Chairman is the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. The Chairman has authority to investigate matters brought to his attention by individuals inside and outside Government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent staff whose principal duties are to furnish administrative and research support to the Assembly and committees of the Conference, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations and in providing advice and assistance to the agencies and to committees of the Congress.

Robert A. Anthony, the fourth Chairman of the Administrative Conference, resigned on October 31, 1979, having served through the expiration of his term in office. Since then, the Conference has been headed by the Vice Chair of the Council, Margaret A. McKenna, pending the appointment of a new Chairman by the President.

THE COUNCIL

The Council consists of the Chairman and 10 other members who are appointed by the President for 3-year terms, of whom not more than one-half may be drawn from Federal agencies. Its functions are similar to those of a corporate board of directors. It has authority to call plenary sessions of the Conference and fix their agendas, to recommend subjects for study, to receive and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

Michael N. Sohn, General Counsel of the Federal Trade Commission, was appointed to the Council in June, 1979 by President Jimmy



Members of the Council. Top, left to right: Michael N. Sohn, Edward C. Schmults, Betty Southard Murphy, and Michael J. Egan. Below, left to right: Joan Z. Bernstein, Ira M. Millstein, Richard C. Van Dusen, and Otis M. Smith.

Carter. During the year, three valued government members, Michael J. Egan, Betty Southard Murphy, and Michael Perschuk, left the Council.

THE ASSEMBLY

The Assembly of the Conference is composed of the entire membership, which by statute may not be less than 75 members nor more than 91. The Conference at present has 89 members. The Chairman and the other members of the Council account for 11 of this number. The remaining 78 fall into the following groups:

First, the act confers membership upon the Chairman of each independent regulatory board or commission (5 U.S.C. § 573 (b) (2)). Under this provision 14 boards and commissions have statutory members. In addition, pursuant to 5 U.S.C. § 573 (b) (4), one of these agencies has been allotted a second member by the Council for the purpose of permitting the designation of an administrative law judge. The agencies in this category, with the number of members, are:

1. Board of Governors of the Federal Reserve System.....	1
2. Civil Aeronautics Board.....	1
3. Commodity Futures Trading Commission.....	1
4. Consumer Product Safety Commission.....	1
5. Federal Communications Commission.....	1
6. Federal Election Commission.....	1
7. Federal Home Loan Bank Board.....	1
8. Federal Maritime Commission.....	2
(Includes Administrative Law Judge)	
9. Federal Energy Regulatory Commission.....	1
10. Federal Trade Commission.....	1
11. Interstate Commerce Commission.....	1
12. National Labor Relations Board.....	1
13. Nuclear Regulatory Commission.....	1
14. Securities and Exchange Commission.....	1
Total	15

Second, the Act grants membership to the head (or his designee) of each executive department or other administrative agency designated for this purpose by the President (5 U.S.C. § 573 (b) (3)). Acting under this authority, the President has designated 12 Cabinet departments for membership, and the Council has acted to provide some of them additional members, as follows:

1. Department of State.....	1
2. Department of the Treasury.....	2
(Includes Internal Revenue Service)	
3. Department of Defense.....	1
4. Department of Justice.....	1
5. Department of the Interior.....	1
6. Department of Agriculture.....	1
7. Department of Commerce.....	1

8. Department of Labor-----	2
(Includes Administrative Law Judge)	
9. Department of Health, Education, and Welfare-----	3
(Includes Social Security Administration and Food and Drug Administration)	
10. Department of Housing and Urban Development-----	1
11. Department of Transportation-----	2
(Includes Federal Aviation Administration)	
12. Department of Energy-----	1
 Total -----	 17

The other administrative agencies designated for membership by the President are as follows:

1. Environmental Protection Agency-----	1
2. Federal Deposit Insurance Corporation-----	1
3. Equal Employment Opportunity Commission-----	1
4. General Services Administration-----	1
5. National Aeronautics and Space Administration-----	1
6. Office of Management and Budget-----	1
7. Occupational Safety and Health Review Commission-----	1
8. Small Business Administration-----	1
9. U.S. Commission on Civil Rights-----	1
10. Office of Personnel Management-----	1
11. U.S. Postal Service-----	1
12. Veterans Administration-----	1
 Total -----	 12

The final group consists of the public members appointed by the Chairman with the approval of the Council for 2-year terms. These members, who must comprise not less than one-third nor more than two-fifths of the total membership, are selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to Federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation.

At present the public memberships number 36. The terms of all incumbent public members will expire on June 30, 1980.

In addition, pursuant to section 4 of the bylaws, the Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the Judiciary, Federal agencies, and professional associations not represented on the Conference. Individuals who serve in such a capacity participate in the deliberations of the Conference with privileges of the floor but do not vote. Currently, seven liaison arrangements are in effect.

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. It has adopted



Consideration of Recommendation 79-1 at the Nineteenth Plenary Session. Left to Right: Stephen L. Babcock, Executive Director; Michael W. Bowers, Staff Attorney; Professor Barry B. Boyer, Consultant; Public Member Cornelius B. Kennedy, Chairman, Committee on Rulemaking and Public Information; Robert A. Anthony, Chairman.

bylaws establishing nine standing committees, currently chaired by the following members :

1. Agency Decisional Processes..... James E. Wesner
2. Agency Organization and Personnel..... Earl W. Kintner
3. Compliance and Enforcement Proceedings..... Anthony L. Mondello
4. Grants, Benefits and Contracts..... S. Neil Hosenball
5. Informal Action..... Clark Byse
6. Judicial Review..... William H. Allen
7. Licenses and Authorizations..... Owen Olpin
8. Ratemaking and Economic Regulation..... Betty Jo Christian
9. Rulemaking and Public Information..... Cornelius B. Kennedy

These committees meet periodically to plan and guide research by academic consultants and by the Conference's professional staff, and on the basis of such research to frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, they are circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for final action



At the Twentieth Plenary Session. Top to bottom: Margaret A. McKenna, Acting Chair, and Stephen L. Babcock, Executive Director, discussing the agenda. Richard K. Berg, Executive Secretary, calling the roll. Margaret A. McKenna, Acting Chair, presiding over the discussion of the report of the Special Committee on the Role of the Conference, being presented by Interstate Commerce Commission Member Betty Jo Christian.

in plenary session. The Assembly may adopt the recommendation in the form proposed, amend it, refer it back to committee or reject it entirely.

Since January 1968 the Assembly of the Conference has adopted a total of 78 recommendations many with multiple parts, of which 7 were adopted during the period covered by this report.

Volumes I, II, III, and IV of the recommendations and reports of the Administrative Conference of the United States, published in June 1970, June 1973, June 1975, and December 1979, respectively, contain the official texts of the recommendations and statements adopted by the Assembly during the period January 8, 1968, to December 31, 1977. The fourth volume, covering the period from July 1, 1974, through December 31, 1977, contains an index to volumes I through IV and was published during the period of this report.

These volumes also contain the full texts of the research reports that support the recommendations, and a bibliography of other reports prepared under the auspices of the Conference. (Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C.)

The recommendations and statements of the Conference, including those adopted since the publication of volume IV of the Conference's recommendations and reports, are also published in the annual reports of the Conference; in the Federal Register (43 Fed. Reg. 27507, 44 Fed. Reg. 1357, 44 Fed. Reg. 38817, 45 Fed. Reg. 2307); and those of continuing interest in the Code of Federal Regulations, title I, parts 305 and 310.

ACTIONS OF THE ASSEMBLY

The Nineteenth (June 7-8) and Twentieth (December 13-14) Plenary Sessions were held in Washington in 1979. The Assembly adopted seven recommendations, four resolutions, and an amendment to the Conference's bylaws. The full texts of the recommendations, resolutions and the amendment to the bylaws appear at page 38, below. A summary of the recommendations follows:

SUMMARY OF RECOMMENDATION 79-1

HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION

Recommendation 79-1 sets forth a number of procedures, including some already utilized or endorsed by the FTC, which the Conference believes will promote effective and efficient rulemaking under the Magnuson-Moss Act. It calls for the FTC to enhance the degree and effectiveness of public participation at all stages by, among other things: publishing with the notice of proposed rulemaking the theories and materials it considers relevant to the rule, and making the staff investigative report available at that time; experimenting with techniques in conducting investigations designed to elicit increased information from the public, including the use of advance notices of proposed rulemaking with opportunity for comment and open meetings; improving public access to rulemaking records; and providing guidance to participants as to effective methods of marshalling and presenting information.

The Recommendation states that the Commission should generally restrict the use of subpoenas to the investigation conducted by the staff to develop information relevant to rulemaking, and should permit the subpoena power to be utilized only sparingly once a hearing has been noticed. In lieu of discovery, the Conference recommends that the Commission authorize its Presiding Officers, on their own motion or that of any participant, to request that the FTC staff or any other participant at the hearing clarify or elaborate on any of its oral or written presentations, and to draw adverse inferences from failure to comply with such a request. The Recommendation also seeks to ensure that, where a person requests for use in a pending rulemaking proceeding information that is exempt under the Freedom of Information Act, the FTC will not affirm denial of the request with-

out first obtaining the views of the Presiding Officer in the proceeding as to the information's utility.

The Conference also recommends several practices concerning the FTC's use of hearing under the Magnuson-Moss Act. It suggests that the FTC should generally conduct an initial legislative-type hearing, following which it should determine whether there exist "disputed issues of material fact it is necessary to resolve" and hold a further hearing to resolve any issues that have been specifically designated as such. The Recommendation also calls on the Commission to state the basis for any decision to limit or deny cross-examination on a designated issue of material fact. It states further that the FTC, when utilizing legislative-type hearings, should structure the hearing according to whether its intended purpose is predominantly fact-gathering, assessing public views, or clarifying positions and exchanging views on policies, values or desirable lines of inquiry, in order to obtain maximum information effectively.

SUMMARY OF RECOMMENDATION 79-2

DISPUTES RESPECTING FEDERAL-STATE AGREEMENTS FOR ADMINISTRATION OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM

Recommendation 79-2 is addressed to the Department of Health and Human Services, and calls for improvements in (a) the process followed to arrive at "Model Agreements" between Health and Human Services and States electing Federal Administration of State Supplementary benefits under the Supplemental Security Income Program (SSI) and (b) the procedures for resolving disputes and measuring the respective liabilities of the Federal Government and the States under SSI.

More specifically, the Recommendation states that the Model Agreements' terms should be developed by a procedure that embraces both negotiation between HHS and a representative committee of State officials and the notice and public comment procedures of 5 U.S.C. § 553, so that individual States, beneficiaries and other interested persons may present views upon proposed agreements' terms and the agreement-formation process. It calls on HHS to give consideration to new provisions for measuring the respective liabilities of the Federal Government and the States, including use of liability standards and measurement systems generally acceptable to the States and separate treatment of liability for errors resulting from consistent Federal practices that violate statute, regulation or agreement. Recommendation 79-2 further suggests that the Model Agreements be amended to provide that all disputes thereunder be subject to established dispute resolution procedures, that all disputes be resolved



Members of the Conference in Assembly at the Twentieth Plenary Session. Foreground, left to right: Public Member Anthony L. Mondello, Chairman, Committee on Compliance and Enforcement Proceedings; Department of Health, Education and Welfare Member Andrew J. Young; Administrative Law Judges Conference Liaison Member William J. O'Brien.

promptly, and that the final stage of the administrative dispute process be before the HHS Departmental Grants Appeals Board.

SUMMARY OF RECOMMENDATION 79-3

AGENCY ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES

Recommendation 79-3 is addressed to agencies that have authority to impose civil money penalties as a part of their enforcement responsibilities. This Recommendation calls for the establishment, preferably through rulemaking or publication of policy statements, of appropriate standards for the exercise of any discretion in this area in order to promote consistency, efficiency and openness in the agency assessment and mitigation processes. The Recommendation urges the establishment of standards, available to the public and subject to periodic reevaluation as to effectiveness, that specify the factors to be considered in determining penalty amounts in particular cases. The Recommendation provides some advice on the nature of those standards and further states that agencies should collect and index their written decisions made in response to mitigation requests or after agency assessment hearings. Recommendation 79-3 calls upon agencies to make these decisions public, except to the extent that such disclosure is prohibited by law, and to follow, distinguish, or explain departure from a decision cited as precedent by a respondent.

The Recommendation also encourages agencies to give adequate written notice to respondents of the factual and legal bases for penalty assessment and mitigation and sets forth some suggestions

regarding the initial assessment and mitigation of penalties. It recognizes that while respondents may have an opportunity for a trial-type hearing to contest a penalty, either at the agency or court level (depending on the particular statute), agencies should develop fair and economical informal procedures to permit the resolution of such cases in advance of a trial-type hearing. It also urges agencies to consider, where the statute permits it, establishing by regulation that the respondent's ultimate opportunity for a trial-type hearing is satisfied by agency adjudicatory procedures comparable to those authorized by the Administrative Procedure Act, 5 U.S.C. §§ 554-557. Recommendation 79-3 adds that where an agency has in fact followed an APA-type procedure for imposing a civil penalty, a court should ordinarily utilize a limited scope of review of the agency's action unless the applicable statute provides for *de novo* judicial proceedings.

SUMMARY OF RECOMMENDATION 79-4

PUBLIC DISCLOSURE CONCERNING THE USE OF COST-BENEFIT AND SIMILAR ANALYSES IN REGULATION

Recommendation 79-4 is addressed to agencies that use cost-benefit and similar analyses in organizing available information to determine the consequences of various possible courses of agency action. It seeks to promote openness in the decisionmaking process, to ensure that those agencies will utilize sound analytic methods, and to enhance public confidence in the conclusions finally reached. To accomplish these purposes, the Conference recommends that such agencies give the public adequate advance notice of their intended analytic methodologies, and that they state at the time of final determination the weight given the analysis and any revisions of assumptions or preliminary findings. The recommendation is not intended either to promote or to discourage the use of any single kind of analysis as a framework for agency decisionmaking.

SUMMARY OF RECOMMENDATION 79-5

HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION- ADMINISTRATION OF THE PROGRAM TO REIMBURSE PARTICIPANTS' EXPENSES

Recommendation 79-5 is addressed in part to the FTC and other agencies that have expense reimbursement programs for rulemaking proceedings, and sets forth principles for the guidance of these agencies regarding the administration of reimbursement programs. The Conference also commends these principles to Congress for its consideration in the event it should undertake to create statutory

reimbursement programs. The recommendation is intended to promote informed, impartial agency decisions on reimbursement applications, encourage public participation in these programs, and ensure the effective participation of recipients. The present recommendation does not take a position on the desirability of programs to reimburse rule-making participants, though the Conference anticipates that this question will be addressed in its forthcoming final report to Congress on FTC rulemaking under the Magnuson-Moss Act.

Recommendation 79-5 states that each agency should specify the purposes intended to be served by an expense reimbursement program, as well as the factors that it will consider in making award determinations. It also calls on the agency to afford members of the public an opportunity to comment on proposed regulations and guidelines for administering expense reimbursement programs, and to use outreach measures and other affirmative steps to inform potentially interested persons of the availability of funding. The Conference recommends that advance payment to recipients should be made available where necessary to allow adequate preparation for participation and that effective programs for auditing and evaluating the performance of reimbursed entities should be established.

The Conference believes that responsibility for granting or denying applications should not be given to personnel in the office within the agency that has direct responsibility for developing the staff position in the proceeding where reimbursement is sought. However, these persons, and others familiar with the proceeding (including the presiding officer), should give their views as to the value of an applicant's



Selective Service System Liaison Member Henry N. Williams, left; Office of Management and Budget Member Wayne G. Granquist, right.

proposal to the persons with responsibility for granting or denying applications. Recommendation 79-5 states that applicants for funds should be advised, promptly and in writing, of the reasons for grant or denial of their applications, and that all advisory letters should be indexed and made publicly available.

SUMMARY OF RECOMMENDATION 79-6

ELIMINATION OF THE PRESUMPTION OF VALIDITY OF AGENCY RULES AND REGULATIONS IN JUDICIAL REVIEW

Recommendation 79-6 specifically opposes enactment of the Bumpers Amendment to the Federal Courts Improvement Act of 1979. The recommendation also addresses itself to similar proposals intended to alter or reverse any presumption of validity that attaches to agency rules or regulations or to preclude judicial deference to administrative expertise or to an agency's interpretation of its statutory authority. The recommendation also points out several specific problems raised by the language of the Bumpers Amendment which support the Conference's belief that these across-the-board proposals are unwise and do not effectively address the concerns prompting such legislation.

SUMMARY OF RECOMMENDATION 79-7

APPROPRIATE RESTRICTIONS ON PARTICIPATION BY A FORMER AGENCY OFFICIAL IN MATTERS INVOLVING THE AGENCY

Recommendation 79-7 recognizes that, for a variety of reasons, restrictions on post-employment activities of former government employees may be necessary. However, since such restrictions impose burdens on these persons and may make public employment less attractive, the recommendation states that they should not be drawn more broadly than necessary to deal with the dangers realistically presented.

Specifically, the Conference believes that the problem of post-employment activities is too complicated for fair and effective enforcement by criminal sanctions in most cases, and states in Recommendation 79-7 that the primary tool for enforcing 18 U.S.C. § 207 should be the administrative remedies provided by Section 207(j), with criminal penalties reserved for clearcut and egregious violations. The Conference recommends that Section 207 should be amended to limit restrictions on post-employment activities. The revised statute should retain the present permanent bar (18 U.S.C. § 207(a)) on representation of a private party in any particular matter involving a specific party in which the former employee participated "personally and substantially" on behalf of the government. But Recommendation 79-7 states that, aside from the present 1-year "cooling off period" (18 U.S.C. § 207 (c)-(d)) on personal advocacy by former high-level per-

sonnel before their former agency, there should be no statutory restriction on representation with respect to other matters, such as those which were pending under the former employee's official responsibility but as to which he or she had no personal and substantial participation. The Conference also recommends that the 1-year ban should reach only personal attempts to influence the agency, but not "aiding or advising" private colleagues or clients or obtaining information from the agency.

The Conference further recommends that the revised statute authorize Federal agencies to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs. Recommendation 79-7 states that this legislation should preempt the rules of professional organizations or courts imposing additional post-employment restrictions.

The recommendation also sets forth the Conference's judgment that the disqualification of a former employee should not ordinarily extend to his or her former organization and that a "screening" arrangement should usually be sufficient precaution. While courts should retain authority to decide that the circumstances of a particular case require a broader disqualification, they should give special weight to the agency's views as to whether the "screening" process affords adequate protection to its interests.



Top: Department of Justice Member John H. Harmon addressing the Assembly at the Twentieth Plenary Session. Middle left to right: Public Member Hans A. Linde, Civil Aeronautics Board Member Mary A. McInnis, Department of Transportation Member Clark H. Onstad, Public Member Richard E. Wiley, Public Member John W. Pettit. Lower left to right: Public Member Katherine E. Sasseville, Administrative Office of the United States Courts Liaison Member Joseph F. Spaniol, Jr., Public Member Owen Olpin, Chairman, Committee on Licenses and Authorizations, Public Member Frederick R. Anderson, Jr.



Members of the Conference in debate at the Nineteenth Plenary Session. Upper left: Public Member Kenneth Culp Davis. Upper right: Public Member Rhoda H. Karpatkin. Lower left: Public Member Antonin Scalia. Lower right: Public Member James E. Wesner, Chairman, Committee on Agency Decisional Processes.

ACTIVITIES OF COMMITTEES

The membership participates actively in the research activities of the Conference through the nine standing committees prescribed by the bylaws and through such additional special purpose committees as the Chairman, Council, or membership finds necessary to further the Conference's mandate. During the period of this report one such committee, the Special Committee on the Role of the Conference, was in existence. Each committee has a generally prescribed field of inquiry suggested by its title. Distinctions between committee jurisdictional responsibilities are intentionally fluid in order to permit the members wide latitude of inquiry. Since projects are often pertinent to the concerns of more than one committee, the Office of the Chairman coordinates the committees' activities to prevent conflict or duplication of effort.

1. COMMITTEE ON AGENCY DECISIONAL PROCESSES

Chairman, JAMES E. WESNER

This committee was established in 1976 to address certain areas of agency activity that did not naturally fall within the jurisdiction of the previously existing committees of the Administrative Conference. The committee's area of responsibility includes formal adjudicatory procedures, the use of particular kinds of evidence, institutional decisionmaking, techniques of gathering and using information, and generic causes of delay.

Completed Project

Use of cost-benefit and similar analyses in regulation (Consultant: Michael S. Baram, Franklin Pierce Law Center) (Recommendation 79-4).

Pending Projects

Disqualification of Decisional Officials in Rulemaking (Consultant: Peter L. Strauss, Columbia University School of Law).

Feasibility of Uniform Rules of Administrative Procedure (Consultant: John L. FitzGerald, Southern Methodist University).

2. COMMITTEE ON AGENCY ORGANIZATION AND PERSONNEL

Chairman, EARL W. KINTNER

This committee is concerned with the distribution of responsibility and authority within agencies, including the adequacy of procedures to review internal delegations and to assure separation of functions;

personnel practices which bear upon the competence, professionalism, and effectiveness of personnel involved in the conduct of administrative proceedings; and administrative procedures which affect the hiring, compensation, and tenure of Federal employees.

Completed Project

Participation in agency proceedings by former agency attorneys (Consultant: Thomas D. Morgan, University of Illinois College of Law) (Recommendation 79-7).

Pending Project

Agency experience under the Federal Advisory Committee Act (Consultant: Michael Cardozo, Lawyer, Washington, D.C.).

3. COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS

Chairman, ANTHONY L. MONDELLO

The Committee on Compliance and Enforcement Proceedings examines administrative policies, techniques, and procedures for assuring compliance with Federal laws and regulations, including the availability of administrative remedies and the application of sanctions by administrative agencies.

Pending Project

Disclosure as a regulatory technique (Consultant: Roy A. Schotland, Georgetown University Law Center).

4. COMMITTEE ON GRANTS, BENEFITS AND CONTRACTS

Chairman, S. NEIL HOSENBALL

This committee considers the procedures by which agencies administer Federal loan, grant, benefit, and contract programs, including procedures for the award or termination of financial assistance.

Completed Project

Procedures used to resolve disputes between Federal and State Governments under the Supplemental Security Income program (Consultant: Peter Martin, Cornell Law School) (Recommendation 79-2).

5. COMMITTEE ON INFORMAL ACTION

Chairman, CLARK BYSE

This committee has a wide mandate to investigate agency action affecting private rights that do not involve formal, structured proceedings. This comprises, quantitatively, the bulk of agency action, and is often characterized by a particularly broad scope of agency discretion.

Pending Projects

Agencies' exercise of discretion in seeking the imposition of criminal sanctions (Consultant: William J. Lockhart, University of Utah School of Law).

Techniques for narrowing or avoiding formal evidentiary hearings in licensing proceedings (Consultant: William F. Fox, Catholic University, The Columbia School of Law).

6. COMMITTEE ON JUDICIAL REVIEW

Chairman, WILLIAM H. ALLEN

This committee examines the law concerning judicial review of administrative action, and those aspects of administrative procedures that have particular effect upon the availability or effectiveness of judicial review. Although the committee studies these matters primarily from the perspective of the agencies, it also necessarily considers the effect of relevant case law and new proposals upon the functioning of the courts themselves.

Completed Project

Elimination of the presumption of validity of agency rules and regulations in judicial review, as exemplified by the Bumpers Amendment (Consultant: Ronald M. Levin, Washington University School of Law) (Recommendation 79-6).

Pending Projects

Challenging agency rules as a defense to an enforcement proceeding (Consultant: Frederick Davis, University of Missouri School of Law).

Forum shopping for review of national environmental and health standards (Consultant: Thomas O. McGarity, University of Kansas School of Law).

7. COMMITTEE ON LICENSES AND AUTHORIZATIONS

Chairman, OWEN OLPIN

This committee is principally involved in examining the process of licensing or certification to engage in activities that require Federal Government authorization. It is concerned with all aspects of that process, including grant, denial, transfer, modification, suspension, and termination.

Pending Projects

Criteria and procedures used by four Federal regulatory agencies in regulation of cancer-causing substances (Consultant: Richard A. Merrill, University of Virginia School of Law).

8. COMMITTEE ON RATEMAKING AND ECONOMIC REGULATION, *Chairman*, BETTY JO CHRISTIAN

This committee studies the procedures employed by the regulatory agencies in establishing rates, prices, and other charges for regulated industries. It also examines procedures of all agencies with respect to activities that have the effect of economic regulation though not di-

rected toward specifically regulated industries—such as the determination of subsidies, tariffs, quotas, and ceilings.

Pending Projects

Issuance and appeal of Department of Energy remedial orders (Consultant: Alfred C. Aman, Jr., Cornell Law School).

Exceptions and other adjustment processes of the Department of Energy (Consultant: Alfred C. Aman, Jr., Cornell Law School).

Agency treatment of confidential business information (Consultant: Russel Stevenson, The National Law Center, George Washington University).



Attending the Twentieth Plenary Session. Left to right: Public Member Charles R. Halpern, Federal Home Loan Bank Board Member Milan Miskovsky, Public Member Earl W. Kintner, Chairman, Committee on Agency Organization and Personnel.

9. COMMITTEE ON RULEMAKING AND PUBLIC INFORMATION *Chairman, CORNELIUS B. KENNEDY*

The committee examines the areas of administrative activity appropriate for the conduct of rulemaking and studies the procedures employed in rulemaking. As a separate but related charge, the committee considers the public availability and dissemination of information on agency procedures, policies, and action.

Completed Projects

The Phase I report on trade regulation rulemaking procedures of the Federal Trade Commission and a separate report of the Federal Trade Commission's ad-

ministration of the program of direct funding of public participation in trade regulation rulemaking (Consultant: Barry B. Boyer, State University of New York at Buffalo, School of Law) (Recommendation 79-1).

Feasibility study for evaluation of the management and organizational aspects of the conduct of rulemaking by federal agencies (Consultant: Cornelius M. Kerwin, American University School of Government and Public Administration) (Recommendation 79-5).

Pending Project

The Phase II report on trade regulation rulemaking procedures of the Federal Trade Commission, including an assessment of the effect of public participation of rulemaking (Consultant: Barry B. Boyer, State University of New York at Buffalo, School of Law).

10. SPECIAL COMMITTEE ON THE ROLE OF THE ADMINISTRATIVE CONFERENCE, *Chairman*, ROBERT A. ANTHONY

This special 20-member committee was formed during the year to assist the Chairman and the Council in carrying out their responsibilities under the resolution of the Nineteenth Plenary Session concerning the future role and character of the Administrative Conference and other matters.

Completed Projects

An enhanced role for the Administrative Conference in procedural reform (Resolution of the Assembly, December 13, 1979).

Participation of members in Conference activities (Amendment to the Bylaws, December 13, 1979).

Pending Projects

Methods of undertaking projects leading to recommendations.

Implementation of Conference recommendations.

WORK OF THE CHAIRMAN'S OFFICE

BUDGET AND STAFF

The Conference's budget for fiscal year 1979 was \$1,062,000, and that for fiscal year 1980 is \$1,079,000. The permanent staff of the Conference varied between 18 and 20 during the reporting period. During this period the Office of the Chairman continued its existing practice of supplementing staff resources with part-time consultants and legal interns.

REGULATORY DEVELOPMENTS AFFECTING THE CONFERENCE

The 96th Congress, 1st Session, considered several major regulatory reform proposals. The Senate Governmental Affairs Committee held extensive hearings on S. 262, introduced by Senator Ribicoff and S. 755, the Administration's proposed bill. The Judiciary Committee developed its own regulatory reform bill, S. 2147, which was reported out of subcommittee late in the year. Each of these bills would dramatically revise agency rulemaking and adjudication procedures, and would significantly amend the Administrative Procedure Act.

In addition, the proposed legislation would alter, in varying degrees, the structure and role of the Administrative Conference. S. 755 would revise the procedure for selection of administrative law judges (ALJs) and would establish a new procedure for review of ACT performance—assigning the overall function to the Administrative Conference. This bill also would establish a program to provide financial assistance to eligible participants in agency rulemaking to help defray the costs of participation, and would require the Administrative Conference to oversee agencies' implementation of this program. S. 2147, as reported, did not include the public participation funding program, and provided for more limited responsibilities with respect to the ALJ program, but it added a mandate that the Conference develop model uniform rules of administrative procedure. S. 262 would have the greatest impact on the Administrative Conference. It would alter the structure of the agency, making the Chairman an "Administrator" with explicit authority to act independently of the membership, which is transformed into a small advisory commission. The bill would give the restructured Conference an expanded role in advising agencies on compliance with procedural statutes, in operating the ALJ program (selection and performance review) and in administering (rather than overseeing) the funding program.

In the House of Representatives, a subcommittee of the Judiciary Committee held hearings and began its markup in early 1980 on H.R. 3263 (S. 755's counterpart in the House).

Conference officials testified on each of these bills during 1979, and the staff consulted frequently with Administration and Congressional staff members on these bills. Copies of testimony are available from the Office of the Chairman.

FORUM ON IMPROVING THE REGULATORY PROCESS

In accordance with its statutory mandate to arrange for the interchange of information potentially useful in improving administrative procedure, the Conference, in late 1979, began sponsoring a continuing Forum on Improving the Regulatory Process.

Chaired by Council Member Ira Millstein, the public Forum included a number of policymakers from within the Administration and from the bar, business community, labor and public interest groups invited to discuss the issues raised by pending regulatory reform proposals. The first sessions focused on the Administration's regulatory reform program, the operations of the Regulatory Council and the Regulatory Analysis Review Group, and the Environmental Protection Agency's development of innovative alternatives to command and control regulation.

Minutes of these sessions are available from the Office of the Chairman.

FEDERAL TRADE REGULATION RULEMAKING PROJECT

The 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Public Law 93-637) established elaborate procedures for developing the FTC's trade regulation rules, and directed the Administrative Conference to study the new rulemaking procedures and report to Congress (§ 202(d)), as amended by Public Law 94-299, § 2, and Public Law 95-558. Professor Barry B. Boyer, Associate Dean of the Law School of the State University of New York, heads a consulting team that is conducting the study called for by this legislation.

Major parts of the Conference's study of Federal Trade Commission rulemaking were completed in 1979. An initial or "Phase I" report was submitted to the Congress in June 1979 and provided the basis for Recommendation 79-1. Staff members from the Office of the Chairman participating in the study were Michael W. Bowers, Project Manager; Sarah G. Flanagan, Linda A. Sedivec, and William C. Bush. The Phase I report contained an evaluation of the pre-hearing and hearing stages of trade regulation rulemaking. The Phase II portion of the study, which will be completed in 1980, will address the

post-hearing stage and will include a comprehensive evaluation of "hybrid" rulemaking procedures.

Professor Barry B. Boyer, the consultant for the project, also prepared a separate report evaluating the FTC's administration of the program for funding of public participation in rulemaking. This program was also established by the FTC Improvement Act of 1975. Staff attorney Sarah Flanagan assisted Professor Boyer in completing the report, which formed the basis for Recommendation 79-5.

UNIFORM CASELOAD ACCOUNTING SYSTEM

The Office of the Chairman has continued to collect caseload and individual case data from almost 30 agencies and departments that employ administrative law judges to preside over formal APA proceedings. The initial report of the Uniform Caseload Accounting System, entitled "Federal Administrative Law Judge Hearings—Statistical Report for 1975," was published in October 1977, and has been widely distributed. This governmentwide inventory of formal proceedings is intended to provide a reference for persons concerned with issues of procedural reform, agency reorganization, and agency management.

The second report, covering fiscal years 1976-78, will be available in mid-1980. Like the first report, it will include caseload figures, elapsed times, and various time and effort data, all broken down by type of case. It will also contain descriptive information about the procedures followed for each covered case type. The target date for completion is somewhat later than originally planned because of unexpected problems in implementing an entirely revised computer procedure for editing and organizing the raw data. The new report incorporates several improvements in data gathering, data processing, and manner of presentation, based on the experience of producing the earlier report, and on comments of agencies and other users of the report. The entire project has been under the direction of staff attorneys Jeffrey S. Lubbers and David M. Pritzker.

IMPLEMENTATION OF RECOMMENDATIONS

The Office of the Chairman took a number of important steps during 1979 to improve its ability to effectuate the procedural improvements called for in the Conference's recommendations. Near the beginning of this period, new Staff Attorney Charles Pou, Jr., was given the task of working with Executive Director Stephen L. Babcock to encourage implementation by affected governmental bodies, and provide assistance to agencies on implementation matters. While the need to devote continuing attention to the problem of implementing recommendations has been recognized since the Conference's inception, Mr. Pou

is the first attorney assigned to this job on a sustained, systematic basis.

As part of its heightened efforts, the Office of the Chairman began attempting to encourage implementation in a wider variety of instances than before. It has now begun to keep track more carefully of agency rulemaking and other activities to which Conference recommendations may pertain, and to take a more active posture in encouraging implementation. Among other things, the Office of the Chairman now initiates reminders to agencies of the existence of past recommendations in light of legislative and regulatory developments, and responds to agency requests for aid in implementing recommendations. For instance, Mr. Pou presently is working with the General Services Administration, administrative law judges and administrative judges from several boards of contract appeals to ensure that adjudicative hearings are held in appropriate facilities, as previously recommended by the Conference. He has also consulted with numerous agencies in an effort to improve their policies on such matters as grant administration, *ex parte* communications in informal rulemaking, and issuance of adverse publicity. Seizing the occasion of the effective date of Public Law 95-224, the Federal Grant and Cooperative Agreement Act, the Office of the Chairman wrote in January to remind Federal grantor agencies of the practices recommended in three previous recommendations on grant administration adopted in 1971 and 1974. Several of these practices have since been recommended by the Office of Management and Budget's recent report to Congress on Federal assistance programs, or in the working papers on which that report is based.

Additionally, during the past year the Office of the Chairman has provided comments to a number of agencies, including some that have not specifically sought the Conference's views, on procedural aspects of their proposed rules. Comments have been addressed to such matters as effective rulemaking and adjudicative procedures, assessment and mitigation of civil penalties, *ex parte* contacts, time limits on agency action, and grant administration procedures. These and similar initiatives are intended to ensure Conference recommendations a hearing in circumstances where options for significant procedural change are being considered, and thereby to increase the quality and effectiveness of agency implementation.

The Office of the Chairman has also commenced a study to evaluate the impact of a prior Conference recommendation calling for agencies to utilize summary decision procedures to avoid unnecessary trial-type hearings (Recommendation 70-3). This study, which will compare various agencies' experiences prior and subsequent to their institution of such procedures, should provide a basis for assessing the relative costs and benefits of agency implementation of the recommendation and thus evaluating its overall utility. Moreover, it should afford use-

ful information on practical factors affecting agency compliance that could prove useful to the implementation of other Conference recommendations.

Another element of the Conference's recent implementation effort has involved developing and organizing detailed information on agency compliance with recommendations adopted in 1977, 1978, and 1979. In 1978, the Office of the Chairman published a special study of the implementation by independent agencies of recommendations adopted prior to 1977. Mr. Pou has been obtaining implementation information regarding both independent agencies and executive departments for the recommendations adopted since that date, and has sought additional information from many agencies whose earlier responses were inadequate. His work will allow the Conference to update and upgrade its 1978 report and to improve the accuracy and completeness of its knowledge of agency implementation.

Several pieces of legislation recently enacted by Congress have served to carry out Conference recommendations, and good prospects exist for additional legislative implementation of Conference recommendations. The Customs Reform and Procedural Simplification Act effectuated those parts of Recommendation 77-2 calling for a fairer approach to imposing penalties for tariff violations. The recent Trade Agreement Act of 1979 implemented other parts of that recommendation, and the pending Customs Court Act of 1980 would go far toward carrying out the remainder of Recommendation 77-2. Congress has chosen to follow the civil penalties approach suggested in Recommendation 72-6 in recent laws affecting the Federal Maritime Commission, the Federal Reserve System, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency. Moreover, the regulatory reform bills presently being considered would implement large parts of several Conference recommendations involving time limits for agency action, selection of administrative law judges, public participation in agency proceedings, agency subpoena power, delegation of final decisional authority, elimination of the proprietary exemption from the Administrative Procedure Act, and choice of forum for judicial review of administrative actions.

As stated above, the Conference adopted seven recommendations in 1979—four at its June Plenary Session and three at the December Session. For a brief description of each, see the discussion above at pages 8-14. Summarized below is the information presently available regarding implementation of these recommendations.

Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission

Recommendation 79-1 suggests a number of procedures intended to help the Federal Trade Commission foster better rulemaking under

the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, by increasing the degree to which the participants in those proceedings focus, at earlier stages in the rulemaking process than has generally been the case to date, on the key issues to be determined. Copies of the recommendation and the extensive report on which it was based were forwarded to the Congress, the FTC, and seventeen additional agencies that employ various hybrid rulemaking procedures. The FTC has not responded formally to the Conference's recommendation, but available information indicates that it has acted to implement several aspects of Recommendation 79-1.

Several parts of the recommendation propose useful methods for enhancing effective participation by members of the public and by knowledgeable experts in the early stages of Magnuson-Moss rulemaking. Since the FTC has initiated no new rulemaking proceedings since Recommendation 79-1 was adopted, an evaluation of the FTC's actual implementation of the improvements called for by these sections necessarily must await the commencement of further Magnuson-Moss rulemakings. For instance, the FTC has had no opportunity as yet to implement the recommendations calling for publishing in the initial notice of proposed rulemaking of all relevant theories and materials, with references to the rulemaking record; for indexing and placing in the rulemaking record all relevant data in the staff's possession and the staff investigative report; for providing early guidance to participants on suggested methods of marshalling and presenting evidence; and for promoting standard methods for presentation of information on issues that recur frequently.

While a definitive judgment on these and other aspects of the Federal Trade Commission's compliance in practice is not yet possible, policies adopted recently by the FTC demonstrate its general agreement with many of the Conference's views. Its Commissioners indicated late in 1979 that they support the Conference's suggestions for using methods such as advanced notice of proposed rulemaking to elicit increased information from the public in conducting investigations, and the FTC's internal Operating Manual now advises the staff to solicit a broad range of views during the investigatory stage. Policies have been adopted that, if carried out, will implement the Conference's call for use of relevant expert opinion at all stages of the rulemaking proceeding. Even before Recommendation 79-1 was adopted, the FTC revised its operating Manual to provide for greater consultation between the Bureau of Consumer Protection and the Bureau of Economics, and another section of that manual now notes the importance of experts and consultants. In its report to Congress on rulemaking under the Magnuson-Moss Act, the FTC stated that a special division has been created in the Bureau of Economics to work exclusively on consumer protection matters and advise rulemaking staffs. Also, an

Impact Evaluation Group, containing experts in economics, consumer behavior and marketing research, has been established in the Bureau of Consumer Protection to study the impact of proposed and final rules.

Another Conference suggestion intended to encourage informed public participation is for the Federal Trade Commission to intensify its efforts to improve access to the rulemaking record by upgrading its management practices and retrieval technologies and by ensuring timely indexing of materials in the record. The Conference's study indicates that in recent proceedings the FTC has managed to improve access to the record. However, it appears there is still room for improvement. Despite FTC statements to the contrary, docket sheets do not consistently list commenters by name and, therefore, comments cannot be retrieved by using the name of a person or organization. This shortcoming could be corrected if the FTC were to implement the Conference's recommendation by using computer indexing, an option it says it is studying at present. Moreover, subject matter indexes made publicly available should be released prior to the oral hearing, rather than during the post-record comment period as is now the case. While the Commission encourages the staff to release its own computerized indexes, it does not require it and these indexes are not generally available for hearing preparation.

Several aspects of Recommendation 79-1 suggest useful approaches to ensuring rulemaking participants adequate access to relevant information. The Federal Trade Commission has not followed the Conference's recommendation to restrict the use of subpoenas to the investigatory stage, and its authority to issue compulsory process to rulemaking participants was upheld in late 1979 by the Court of Appeals for the District of Columbia Circuit in *Federal Trade Commission v. Brigadier Industries Corp.* The FTC has also taken exception to the Conference's call that, in lieu of discovery, the FTC draw adverse inferences from failure to comply with information requests. In its report to Congress, the Commission states that in certain situations "the drawing of adverse influences [sic] from the refusal to provide information may not be an adequate substitute for compulsory process." Rulemaking Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Report of the Federal Trade Commission (June 1979), page 48.

To date the Federal Trade Commission has had no opportunity to carry out those segments of Recommendation 79-1 relating to hearing procedures, and thus there is no basis to judge implementation.

While Recommendation 79-1 specifically addressed only Federal Trade Commission proceedings, many of its principles should prove useful for other agencies that employ hybrid procedures. Many of these agencies have commended the Conference's report for the light

it sheds on the conduct of such proceedings. Several have reviewed their own rulemaking procedures and agreed that many of the recommended procedures could prove beneficial, while others indicated that they are already employing many of these procedures and will intensify their efforts. These include the Consumer Product Safety Commission, the Department of Housing and Urban Development, and the Federal Communications Commission. Others, like the Department of Energy, the Department of Agriculture and the Securities and Exchange Commission, expressed the view that their rulemaking proceedings, including those for which Congress has imposed procedural requirements beyond those mandated by 5 U.S.C § 553, differ so substantially from those conducted by the Federal Trade Commission as to render the Conference's recommendation inapplicable.

Recommendation 79-2: Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program

This recommendation calls on the Department of Health, Education, and Welfare to undertake improvements in the process followed to develop the Model Agreements setting forth the rights and responsibilities of HEW and States that elect Federal administration of State Supplementary benefits, and in the procedures for resolving disputes and measuring the respective liabilities of the parties to those agreements. HEW has stated generally that it is considering several amendments to its procedure under SSI, partly in response to congressional inquiries and Recommendation 79-2, but has not yet replied to the Conference's request for particularized information on its actions to implement this recommendation.

Recommendation 79-3: Agency Assessment and Mitigation of Civil Money Penalties

Recommendation 79-3 calls on Federal agencies to establish and make public prescribed standards and practices for assessing penalties under statutes that provide for civil money penalties, for mitigating penalty assessments, and for conducting administrative proceedings to find the facts on which a penalty assessment may depend. Following its adoption, Recommendation 79-3 was transmitted to thirty agencies that employ money penalties as an enforcement tool. The recommendation also was forwarded to the Judicial Conference of the United States with a request that it consider and help implement that part of the recommendation dealing with appropriate scope of review of agency penalty decisions. Moreover, comments submitted by the Office of the Chairman in recent rulemaking proceedings initiated by the Department of Commerce and the Federal Trade Commission have called on those agencies to modify proposed rules to

conform to parts of Recommendation 79-3. The innovative, far-reaching improvements in agency practice called for by Recommendation 79-3 represent a marked departure from that prevailing in many agencies. Nonetheless, responses to the Conference's request for information on agency implementation indicate that many have begun evaluating their current assessment criteria and practices in light of the recommendation and several have already effected significant changes to comply with it.

The Department of Transportation, for instance, has endorsed the recommendation and commenced an intensive study of certain of its penalty procedures so that it may assess the extent to which the recommended approaches can be implemented throughout the department. This study is being conducted by Professor Colin Diver, upon whose report of the Conference Recommendation 79-3 was largely based. The Federal Reserve System is in the process of developing amendments to its Rules of Practice to incorporate many parts of the recommendation, including those on use and nature of penalty standards, notice of proposed assessment and grounds therefor, and utilization of both informal conferences and trial-type assessment hearings. Other agencies that have just proposed regulations which would implement substantial segments of the civil penalties recommendation are the Federal Home Loan Bank Board, the U.S. Postal Service, and the Department of Housing and Urban Development. The Environmental Protection Agency, which already uses many of the recommended approaches, has proposed a new penalty system under the Toxic Substances Control Act which would implement that part of the recommendation dealing with assessment criteria detailing guidelines for fixing and adjusting penalty determinations.

Several agencies are now in the process of evaluating their current procedures in light of the recommended practice, and have promised to provide further information regarding steps to implement the recommendation upon completion of the review process. These include the Commodity Futures Trading Commission, the Department of Energy, the Department of the Interior, and the Interstate Commerce Commission. The Department of Commerce's Office of General Counsel has stated that it will work with those constituent agencies of the Department that have not yet complied with the recommendation to re-examine their procedures and determine the practicability of their adopting the suggested procedures. The Consumer Product Safety Commission reports that it is complying at present with several aspects of the recommendation, including those on trial-type hearings, informal settlement procedures, and use of precedents. The Commission advises further that it "will consider publishing its evaluative criteria (for assessing penalties) and soliciting public comments, as recommended by the Conference, as (its) experience in assessing and collect-

ing civil penalties develops a pattern indicating factors and strategies which should be considered in most cases.

A few agencies, including the Securities and Exchange Commission and the Department of Defense, did not believe Recommendation 79-3 applicable to their operations. The Occupational Health and Safety Review Commission, while it agreed to examine the possibility of providing simplified procedures in cases involving only penalty issues, found most parts of the recommendation inapplicable since its function is to decide disputed cases after proposed penalties have been set by the Department of Labor. The Labor Department has not yet provided any information on its compliance with the Conference's recommendation.

Recommendation 79-4: Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation

Seeking to make cost-benefit analysis a sound, useful part of agency regulatory efforts and to ensure openness in the decisionmaking process the Conference recommends that agencies publish their procedures, methodologies, and assumptions when using such analyses. The recommendation does not promote or discourage any particular kind of analysis. The Conference forwarded copies of the recommendation, and the report on which it was based, to 18 Federal regulatory agencies.

The Consumer Product Safety Commission has already implemented the goals of Recommendation 79-4. The Department of the Treasury has given qualified support to the Conference's recommendation, and currently is considering an amendment to its directive pursuant to Executive Order 12044, Improving Government Regulations, that would implement several parts of the recommendation. Under the proposal, when Treasury decides to employ such an analytical technique, its notice of proposed rulemaking would set forth that fact, the weight to be given the analysis, the approach to be followed, and the assumptions adopted. The Department of Energy's notices presently contain similar information when analyses are used, but the Department states that it is currently reviewing the recommendation and will advise the Conference on implemental steps to be taken.

Several agencies stated that their procedures for complying with Executive Order 12044 are consistent in many ways with Section 1 of the Conference's recommendation. These include the Departments of Transportation, Housing and Urban Development, Commerce, and Agriculture.

The General Services Administration could not assure the Conference it would carry out Recommendation 79-4 except insofar as the

recommendation was consistent with other initiatives being undertaken, since it believed the effort required to implement the recommendation would be too burdensome and duplicative.

Most agencies have not implemented that section of the recommendation calling for adoption of generic regulations or policy statements to describe the use of cost-benefit analyses where a pattern of recurring decisional problems exists for which this particular analytic technique is appropriate. The Federal Trade Commission, the Department of Transportation and the Consumer Product Safety Commission, for instance, have informed the Conference that their regulatory actions are too diverse to permit a broad policy statement to provide meaningful guidance in particular situations.

Recommendation 79-5: Hybrid Rulemaking Procedures of the Federal Trade Commission: Administration of the Program to Reimburse Participants' Expenses

Addressed in part to the Federal Trade Commission and other agencies with expense reimbursement programs for their rulemaking proceedings, Recommendation 79-5 is intended to serve as a guide for establishing and administering effective programs of this type. The Conference also commends the principles set forth in the recommendation for Congress' consideration in the event it should formulate a statutory reimbursement program. The recommendation, adopted in December 1979, was transmitted to all Federal agencies that now have or are initiating such programs, as well as to the congressional committees that oversee them. Also, copies were forwarded to those committees in each House presently considering public participation proposals for various agencies' proceedings.

The Federal Trade Commission's reimbursement program, upon whose initial experience Recommendation 79-5 is based, is in general compliance at this time. Responses to date from other agencies do not allow generalization regarding their compliance. The Federal Communications Commission has issued a notice of proposed rulemaking for a reimbursement program whose procedures would carry out most aspects of the recommendation.

Recommendation 79-6: Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment

This recommendation expressed the Conference's conclusion that congressional proposals to change the standard for judicial review of agency action, like the so-called Bumpers Amendment, could have unfortunate and unpredictable effects and should not be adopted. Shortly after its adoption, copies of the recommendation and supporting re-

port were forwarded to the committees in Congress considering such proposed legislation. These materials also were sent to each administrative agency and department to aid in formulating and commenting upon proposed legislation. The Office of the Chairman will continue to monitor the progress of pertinent legislation and will take appropriate action to ensure congressional consideration of the Conference's position.

Recommendation 79-7: Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency

Recommendation 79-7 calls on the Congress to amend the statutes that presently govern conflicts of interest involving former Federal employees to provide a simpler, more direct way of preventing the potentially undesirable consequences associated with post-government employment activities. The Office of the Chairman sent copies of the recommendation to the congressional committees in both Houses responsible for such legislation, as well as to the heads of nearly fifty Federal agencies and several other interested organizations. Since implementation of the Conference's recommendation will require action by Congress, the Office of the Chairman proposes to act to express the Conference's views when implemental legislation is considered.

RESEARCH ACTIVITIES

During 1979 the Office of the Chairman commissioned 11 new projects with outside consultants.

Two of these are directly related to functions which would be given the Conference under some versions of regulatory reform legislation now being considered by the Congress. First, Professor Victor Rosenblum of Northwestern University is preparing a report on possibilities and problems in evaluating the performance of administrative law judges. Since the Conference may well end up with the responsibility for establishing an ALJ evaluation system it seemed imperative that we begin to analyze the issues systematically. If the Conference is not given this responsibility, of course, the report will still be useful as an independent document. Second, some pending legislation would also give the Conference responsibility for developing uniform rules of administrative procedure for use by agencies. Professor John Fitzgerald of Southern Methodist University is preparing a report on areas in which such rules might be feasible and useful. The American Bar Association Section on Administrative Law has long been interested in this topic, and Professor Fitzgerald is drawing heavily on the section's experience.

A number of other recently commissioned projects are also related to major concerns of the contemporary movement for regulatory re-

form. Professor Peter Strauss of Columbia University is analyzing current and possible standards for disqualification of agency officials from rulemaking proceedings, and Dean Paul Verkuil of Tulane University is examining participation in rulemaking proceedings by the staff of the Executive Office of the President. Both these projects are of course related to the study of separation of functions in agencies by Professor Michael Asinow of the University of California (Los Angeles), commissioned in 1978.

Another regulatory reform project was recommended by the Federal Commission on Paperwork when it suggested that the Administrative Conference should study retroactivity in the application of agency rules. The Chairman concluded that a full-scale study in this area would be beyond the resources of the Conference, but Professor Stephen Wood of Brigham Young University is working on the design-phase of such a study. If a larger study seems feasible and desirable the Conference will try to persuade other agencies to cosponsor further work. The retroactivity issue involves questions of economics and political science as well as law, and Professor Wood is being assisted in this work by colleagues in those areas.

The race to the courthouse to appeal rulings is being studied by Professor Thomas McGarity of the University of Kansas. Professor McGarity is looking not only at methods for making the race fair, but also at the more general problem of determining the appropriate forum for review of agency action. Professor William Fox of Catholic University is examining another topic that has become of great interest in connection with regulatory reform legislation—techniques for narrowing or avoiding formal evidentiary hearings in licensing proceedings. This project will examine such devices as summary decision processes and paper-record hearings.

Two other projects are the result of the Office of the Chairman's interest in promoting interdisciplinary study of the "efficiency, adequacy, and fairness of . . . administrative procedure." Peter Szanton, an independent consultant with the firm of Hamilton, Ravinovitz & Szanton, is working with five other experts in political science, economics, and management to prepare a set of papers on the lessons that can be learned from government reorganization efforts. The objective is to produce a short and reasonably comprehensive guide for incoming officials on what to consider before starting to reorganize an agency. Professor Neal Kerwin of American University has prepared a report on how the Conference might study how underlying differences in managerial and organizational variables can affect the quality of rulemaking performance in different agencies.

Finally, two projects continue a long history of ACUS interest in particular areas. Professor William Lockhart of the University of Utah is developing prospectus of possible work on the exercise of agency dis-

cretion in seeking imposition of criminal sanctions, and Professor Russell Stevenson of George Washington University is studying agency treatment of confidential business information under Exemption 4 of the Freedom of Information Act.

ADVICE AND ASSISTANCE ON LEGISLATION

The legislative activities of the Office of the Chairman in 1979 were primarily concerned with the Administration's omnibus regulatory reform bill, S. 755/H.R. 3263, and similar proposals. Members of the staff participated in the preparation of the Administration bill. Detailed letters of comment on the Administration bill, as well as on S. 262, the Reform of Federal Regulation Act, and S. 1291, the Administrative Practice and Regulatory Control Act, were submitted to the appropriate committees of the House and Senate. Chairman Anthony testified before subcommittees of the Senate Governmental Affairs Committees and the Senate Judiciary Committee, in June and July, respectively, on regulatory reform legislation. Informal consultation with Office of Management and Budget and Congressional staff on regulatory reform legislation took place continuously throughout the year.

In September, Chairman Anthony testified at a Senate Judiciary Committee hearing on S. 1654, The Customs Courts Act of 1979. This legislation would implement parts of Conference Recommendation 77-2: Judicial Review of Customs Service Actions. Letters of comment were submitted to Congress with respect to S. 330, the Veterans Administration Adjudication Procedure and Judicial Review Act; H.R. 4572, the Public Printing Reorganization Act; H.R. 2540, the Fair Housing Amendments Act; and H.R. 254, the Bureaucratic Accountability Act. Written comments were submitted to the Office of Management and Budget and informal consultations were held with agency and congressional staff on a variety of pending bills and agency draft bills.

ADVICE AND ASSISTANCE TO THE AGENCIES

A significant function of the staff of the Office of the Chairman is to furnish advice and assistance on problems of administrative procedure to the agencies. The Administrative Conference Act specifically contemplates a role for the Conference in advising the agencies and arranging for the interchange of information among them on procedural matters. Because of the Conference's perspective over the broad range of agency and administrative programs, the consultative capacity of its staff is a unique resource. The Office of the Chairman continued actively to perform its advisory and consultative functions during 1979, responding to numerous requests from agencies for guidance on procedural issues.

Staff members provided comments on an increasing number of proposed agency procedural regulations, including the National Oceanic and Atmospheric Administration's (NOAA) draft procedural regulations for administration of title IV of the Outer Continental Shelf Lands Act Amendment of 1978 which created a Fisherman's Contingency Fund to compensate fishermen for losses associated with oil and gas exploration. In addition the staff commented on draft civil penalty procedures of NOAA and the Federal Trade Commission, draft grant administration procedures of the Department of Commerce, and draft rulemaking procedures of the Federal Emergency Management Agency.

In addition to these comments the staff assisted the Department of Housing and Urban Development in its efforts to establish time limits on administrative proceedings, the Office of Personnel Management's Office of Administrative Law Judges on a variety of issues, and the General Accounting Office in its ongoing study of improvements in the enforcement of the Fair Labor Standards Act by the Department of Labor.

The Conference staff also continued to advise a number of agencies on implementing the open meeting provisions of the Government in the Sunshine Act. Much of this advice was derived from the Conference's 1978 publication, "An Interpretive Guide to the Sunshine Act," which has been cited by several courts in recent decisions.

During the year, Conference Research Director James V. DeLong served on the Federal Energy Regulatory Commission's Advisory Committee on Revision of Rules of Practice and Procedure.

SPECIAL COMMITTEE ON THE ROLE OF THE ADMINISTRATIVE CONFERENCE

Several bills proposing to change the organization or functions of the Administrative Conference were introduced in Congress during 1978 and 1979. The Conference's initial responses to these proposals were formulated by Chairman Anthony in consultation with the members of the Council. Acting in response to a resolution of the Assembly adopted at the Nineteenth Plenary Session, Chairman Anthony appointed a Special Committee on the Role of the Administrative Conference. The Special Committee's assignment has been to consider the Conference's response to the various legislative proposals and, more broadly, to develop a general theory of the kinds of functions appropriate for the Conference.

The Special Committee's membership during 1979 consisted of (a) the members of the Council; (b) Conference members William H. Allen, Betty Jo Christian, Wolf Haber, Rhoda H. Karparkin, Malcolm S. Mason, and Anthony L. Mondello; and (c) staff members William C. Bush and Richard K. Berg. Chairman Anthony chaired the Special Committee until his departure from the Conference. Betty Jo Christian

presented the work of the Special Committee at the Twentieth Plenary Session.

The Special Committee proposed to the Assembly a resolution on the future role of the Administrative Conference. The proposal, after being fully debated by the Assembly, was adopted at the Twentieth Plenary Session as the "Resolution on an Enhanced Role for the Administrative Conference in Procedural Reform" (reproduced in full in this report). The Resolution calls for preserving the membership component of the Administrative Conference, and voices the willingness of the Conference to take on several additional responsibilities of a procedural nature.

The Special Committee also considered the matter of attendance of Conference members at plenary sessions and committee meetings, and forwarded to the Twentieth Plenary Session a proposed amendment to the bylaws directing the Chairman of the Conference to take certain actions whenever a member's attendance fails to meet specified standards. The Assembly adopted the Special Committee's proposal as reflected in sections 2(A) (2) (added) and 2(D) (amended) of the current bylaws (reproduced in full in this report).

The Special Committee will continue to be active through the coming year. Items that the Committee plans to consider in 1980 include methods of undertaking projects leading to recommendations, and methods for implementing Conference recommendations. The Committee will report back on these matters to the Twenty-first Plenary Session in June of 1980. Committee member Anthony L. Mondello has agreed to chair the Special Committee until such time as the work of the Committee is completed or the Conference has a new Chairman.

TEXTS OF ASSEMBLY ACTIONS

RECOMMENDATION 79-1

HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION

(Adopted June 7-8, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93-637, which became effective January 5, 1975, provides authority and procedures for the Federal Trade Commission's promulgation of "trade regulation rules." The statute requires the Commission to engage in "hybrid" rulemaking, a style which adds to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such requirements as oral hearings (of both the legislative and evidentiary types), more extensive provision for public comment, including rebuttal, and judicial review of the rulemaking record under a "substantial evidence" standard. Such hybrid procedures represent a new approach to agency legislative rulemaking, aimed at enhancing the public's participation and testing the facts and assumptions upon which the agency bases its regulatory policy. The effectiveness and efficiency of the concept were of continuing concern to the Congress, and section 202(d) of the Magnuson-Moss Act provided:

The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act. [Congress subsequently extended the deadline to not later than June 30, 1979, by Public Law 95-558.]

Since the Magnuson-Moss Act was adopted, 20 proceedings have been initiated by the Commission. By April 15, 1979, only three had been completed (one by withdrawal). The present recommendations, therefore, represent an interim analysis, based on as much information as has been available early enough to report by Congress' deadline of June 1979. The observations and conclusions in this report are based on those proceedings begun prior to April 1976. The Conference has reviewed and considered proceedings instituted after that date

but has not systematically evaluated the experience in such proceedings. The Conference will continue this project with the aim of developing a supplemental report and recommendations as soon as a sufficient number of rulemaking proceedings have been completed to provide perspective on the process as a whole.

While the Commission has significant responsibilities under a number of statutes, its most important activity has always been enforcement of section 5 of the Federal Trade Commission Act, which, as originally enacted, stated "unfair methods of competition in commerce are hereby declared unlawful." This 1914 law was not construed by the courts to be a consumer protection statute. The Supreme Court, in *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), held that the Commission must in each case show some harm to competitors or the competitive system. To make clear its desire that the Commission's protection extend to consumers as well as to competition, Congress, in the Wheeler-Lea Act of 1938, added to the statute a provision that "unfair or deceptive acts or practices in commerce" are also unlawful.

Until the early 1960's the Commission did not attempt to exercise any authority to promulgate legislative rules defining unfair methods of competition or unfair or deceptive acts or practices. It used its authority under Federal Trade Commission Act section 6(g) "to make rules and regulations for the purpose of carrying out the provisions of this Act" only to issue interpretive rules and general statements of policy. Starting in 1963, however, the Commission commenced proceedings aimed at promulgating legislative rules declaring certain specific trade practices unfair or deceptive within the meaning of section 5. Between 1963 and passage of the Magnuson-Moss Act the Commission conducted 35 trade regulation rulemaking proceedings under section 6(g), using the informal notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

The Commission's authority to promulgate trade regulation rules was not free from doubt, however, and, in *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F. 2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (the Octane case), it was challenged in the context of a rule requiring that octane ratings be posted on gasoline pumps. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's power to make such legislative rules under section 5.

During the period the FTC's legislative rulemaking authority was in litigation, debate about the existence and desirability of legislative rulemaking authority to implement section 5 of the Federal Trade Commission Act took place in the Congress. The issue was first raised in bills introduced in late 1969 in the 91st Congress. Opponents of expanded authority for the FTC contended that the Commission did

not possess, and Congress should not give it, the power to make legislative rules, and that any rulemaking power Congress might nevertheless decide to create should be accompanied by restrictions to guide and control its use. The Commission and its supporters contended that the power already existed, though codification might be useful, and that section 553 of the Administrative Procedure Act provided an adequate procedural framework. After the *Octane* decision, the congressional debate moved beyond the issue of whether the FTC ought to have legislative rulemaking authority to the question of what limitations should accompany a delegation or confirmation of such authority. The Magnuson-Moss Act represents the congressional resolution of the different views about FTC rulemaking.

The Act extended the Commission's jurisdiction to matters "affecting commerce" as well as "in commerce," but did not otherwise change the substantive reach or definition of section 5. It added a new section 18 to the Federal Trade Commission Act which confirmed the FTC's authority to issue interpretive rules and general statements of policy, and, further, empowered the Commission to prescribe:

rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The statute also provided:

The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

However, Congress imposed a number of procedural limitations on the Commission's trade regulation rulemaking under section 18. The Commission was directed to "proceed in accordance with section 553" of the Administrative Procedure Act, and, in addition, to comply with several special requirements:

(1) Section 553 requires simply that an agency give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Magnuson-Moss states that the FTC shall "publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule." The substantive effect of this

change is unclear, but has been the subject of debate in several rule-making proceedings.

(2) Section 553 provides that interested persons shall have an opportunity to submit "written data, views, or arguments" unless the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Magnuson-Moss requires the FTC to make all submissions "publicly available," and makes no provision for promulgating legislative rules without allowing an opportunity for public comment.

(3) While section 553 requires neither an oral hearing nor any opportunity for cross-examination or rebuttal, Magnuson-Moss requires the Commission to provide an opportunity for an informal hearing at which an interested person "is entitled . . . to present his position orally or by documentary submissions (or both)," and "if the Commission determines that there are disputed issues of material fact it is necessary to resolve" an interested person is entitled "to present such rebuttal submissions and to conduct (or have conducted . . .) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues." The Commission is also empowered to make rules and rulings for its hearings "as may tend to avoid unnecessary costs or delay." It may, for example, impose time limits, conduct cross-examination on behalf of a person, and require group representation of similar interests.

(4) Section 553 requires an agency to incorporate in any final rules "a concise general statement of their basis and purpose." Magnuson-Moss requires "a statement of basis and purpose" which includes statements as to "the prevalence of the acts or practices treated by the rule," "the manner and context in which such acts or practices are unfair or deceptive," and "the economic effect of the rule, taking into account the effect on small business and consumers." Whether the omission from Magnuson-Moss of the words "concise, general" from the phrase "concise, general statement of their basis and purpose" has substantive importance is, again, a matter of debate.

(5) Magnuson-Moss also allows, but does not require, the FTC to provide compensation for costs of participation to any person "who has, or represents, an interest . . . which would not otherwise be adequately represented . . ." if representation of the interest "is necessary for a fair determination," and if the person "is unable effectively to participate" because he cannot afford to pay the costs. Section 553 has no comparable provision.

The Magnuson-Moss Act also specifically provides for pre-enforcement judicial review of trade regulation rules, on both the traditional Administrative Procedure Act grounds and on special grounds set forth in section 18, 15 U.S.C. § 57a(e). Under the Administrative Procedure Act, a rule may be set aside if, as specified by 5 U.S.C.

706(2) (A)–(D), it is found to be “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.” In addition, under the Magnuson-Moss Act, the Commission’s “action” in a trade regulation rulemaking under section 18 must be supported by “substantial evidence in the rulemaking record,” which consists of the rule, its statement of basis and purpose, the transcript of the oral hearing, any written submissions, and any other information which the Commission considers relevant. However, the “contents and adequacy” of the Commission’s statement of basis and purpose “shall not be subject to judicial review in any respect.” The Court is also empowered to set aside the rule if it finds that denial of cross-examination or rebuttal “has precluded disclosure of disputed material facts which was necessary for a fair determination . . . of the . . . proceeding taken as a whole.”

The requirements added by Magnuson-Moss seem to be based on a different model of rulemaking and the role of outside parties from the one implicit in section 553. In the words of the Conference Report, “[M]ore effective, workable and meaningful rules will be promulgated if persons affected . . . have the opportunity . . . by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.” [1974] U.S. Code Cong. & Ad. News 7765.

The basic statutory objectives of allowing interested persons to challenge the basis of a proposed rule in detail, while limiting cross-examination and other hearing rights in the interest of preserving the efficiency of rulemaking, require a somewhat different strategy of implementation from the approach agencies frequently use in notice-and-comment rulemaking under section 553. Rulemaking under that section has often been treated as a loosely-structured process for fact-gathering and public statement of policy preferences—that is, as a form of decisionmaking in which the agency simply identifies a problem, outlines possible solutions in general terms, and then seeks public data, views and arguments as a means of educating itself about the subject matter. By contrast, effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates, instead of this direct “pipeline” of public views to agency decisionmakers, a “funnel” approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision. This “funnel” approach implies several general attributes of the rulemaking procedures: (a) more systematic, thorough investigation and consideration of rule-

making proposals than would be customary in section 553 rulemaking prior to the publication of a proposed rule; (b) more complete agency disclosure of the factual, legal and policy basis for a proposed rule than would be customary under section 553 and the general requirements of the Freedom of Information Act; (c) procedures and standards which make it possible for participants and decisionmakers to narrow and focus the key matters in dispute sufficiently early in the process to permit reasonable limitations on the use of trial-type hearing procedures. At this time, it is not clear whether, or to what extent, these objectives can be achieved in the context of a broad delegation of rulemaking authority like that granted the FTC by the combination of sections 5 and 18 of the Federal Trade Commission Act. It does seem clear, however, that failure to observe these principles in agency implementation of hybrid rulemaking can impair the efficiency, acceptability, and quality of decisions.

The Magnuson-Moss Act became effective on January 4, 1975. In April 1975 the Commission promulgated Rules of Practice concerning the initial notice stage of rulemaking proceedings and in August, after notice and comment, promulgated rules for the remaining stages of a rulemaking proceeding. By April 1976, using these Rules of Practice, the Commission had commenced 16 rulemaking proceedings under the Magnuson-Moss Act. By April 1979 the number had grown to 20. Of these, three have been completed—two by publication of final rules and one by withdrawal of the proposal. The rest are still in process. Their status is presented in the following chart:

Status of trade regulation rules proposed since passage of the Magnuson-Moss Act

Rule	Notice of proposed rulemaking	Status as of Apr. 15, 1979 ¹
A. Completed rulemakings		
1. Ophthalmic Goods & Services (Eyeglasses).	Jan. 16, 1976 (41 F.R. 2399)	Final rule published on June 2, 1978.
2. Vocational Schools.	May 15, 1975 (40 F.R. 21048)	Final rule published on Dec. 28, 1978.
3. Prescription Drugs.	June 4, 1975 (40 F.R. 24031)	Proposed rule withdrawn on Nov. 24, 1978.
B. Proposed rules before the Commission for final action		
1. Residential Thermal Insulation ("R-Value").	Nov. 18, 1977 (42 F.R. 59678)	Commission met to consider a final rule on Nov. 29, 1978; Jan. 24, 1979.
2. Funeral Practices.	Aug. 29, 1975 (40 F.R. 39901)	Commission met to consider a final rule on Mar. 23, 1979.
3. Care Labeling Amendment.	Jan. 25, 1976 (41 F.R. 3747)	Public comments on reports were due Sept. 13, 1978.
4. Used Cars.	Jan. 6, 1976 (41 F.R. 1089)	Public comments on reports were due Feb. 13, 1979.
5. Hearing Aids.	June 24, 1975 (40 F.R. 26646)	Public comments on reports were due March 29, 1979.
6. Holder in Due Course Amendment.	Nov. 18, 1975 (40 F.R. 53530)	Public comments on reports were due Jan. 24, 1979.
7. Food Advertising.	May 28, 1975 (40 F.R. 23086)	Public comments on reports were due Feb. 26, 1979.

See footnote at end of table.

Status of trade regulation rules proposed since passage of the Magnuson-Moss Act

Rule	Notice of proposed rulemaking	Status as of Apr. 15, 1979 ¹
C. Proposed rules at the post-hearing report-writing stage		
1. Protein Supplements.....	Sept. 5, 1975 (40 F.R. 41144)...	Presiding Officer report released July 31, 1978; BCP report not released.
2. Credit Practices.....	Apr. 11, 1975 (40 F.R. 16347)...	Presiding Officer report released Oct. 13, 1978; BCP report not released.
3. Over-the-Counter Drugs.....	Nov. 11, 1975 (40 F.R. 52631)...	Presiding Officer report released Jan. 4, 1979; BCP report not released.
4. Health Spas.....	Aug. 18, 1975 (40 F.R. 34615)...	Hearings completed on Dec. 16, 1977.
5. Mobile Homes.....	May 29, 1975 (40 F.R. 23334)...	Hearings completed on Jan. 31, 1978.
6. Over-the-Counter Antacids.....	Apr. 6, 1976 (41 F.R. 14534)...	Hearings completed on Feb. 6, 1979.

D. Proposed rules in the pre-hearing and hearing stage		
1. Cellular Plastics.....	July 23, 1975 (40 F.R. 30842)...	Revised Notice of Rulemaking and request for comment on need for TRR published Aug. 9, 1978.
2. Children's Advertising.....	Apr. 27, 1978 (43 F.R. 17967)...	"Legislative" hearing was concluded in March 1979; possible "disputed issues" hearing to be held later.
3. Games of Chance Amendment.....	Oct. 19, 1978 (43 F.R. 48654)...	Scheduled hearings canceled on Jan. 2, 1979, due to limited interest.
4. Standards and Certification.....	Dec. 7, 1978 (43 F.R. 57269)...	Hearing scheduled to begin May 21, 1979.

¹ The usual principal stages of a Magnuson-Moss rulemaking proceeding are: (1) Initial notice of rulemaking; (2) Final notice, designating disputed issues and setting hearing sites and dates; (3) Pre-hearing comment period (from initial notice to 45 days before hearing); (4) Hearing; (5) Post-hearing rebuttal period; (6) Presiding Officer report; (7) Bureau of Consumer Protection (BCP) staff report; (8) Public comments on the Presiding Officer and BCP reports; (9) Final recommendations by Director of BCP; (10) Oral presentations to Commission by interested persons; (11) Commission meetings to consider rule; (12) Publication of final rule and statement of basis and purpose.

The consultant's report documents that these statutory goals of more systematic development of rules by the agency and more effective participation by the public were not fully realized in many of the rulemakings initiated by the FTC. In part, this was because investigations which originated before 1975—with the objective of either selecting individual violators for cease-and-desist actions or commencing section 553 proceedings—were used as the basis for Magnuson-Moss rulemaking proceedings. As a result, information was gathered, and rulemakings were begun, without specific consideration of the meaning of "substantial evidence" in the context of FTC rulemaking or of the kinds of information necessary for an adequate analysis of the particular factors Magnuson-Moss requires to be included in the statement of basis and purpose. Moreover, at the outset the Commission's Bureau of Consumer Protection lacked both the non-lawyer personnel and the traditions necessary for large-scale policy-oriented investigations, and the resources of all kinds necessary to commence 16 rulemaking proceedings in the first year. The problems

were made more difficult by the fact that no other agency had been called upon to implement hybrid rulemaking under so general a mandate as that contained in section 5, and FTC's efforts to find relevant models in the hybrid procedures of other agencies were unsuccessful.

Perhaps the most important factor, however, was that the agency's implementation of hybrid rulemaking did not compel the progressive narrowing described above. The Commission did not take the steps necessary to define the relevant theories, facts and issues at an early stage or to lessen the areas of uncertainty as the proceedings continued. As a consequence, its rulemaking did not seem to result in a progressive sharpening of the Commission's own analyses of the problems. Nor did the proceedings force the participation of other interested persons to be focused, meaningful, or constructive. At the same time, of course, the statute and the FTC's Rules of Practice gave these other interested persons many opportunities to participate. This combination of broad procedural rights and lack of guidance as to the effective use of the rights resulted in extensive, repetitive presentations.

The specific problems were:

1. *The initial basis for public participation.*—If interested persons are to submit informed comment and challenge the factual bases of a proposed rule, they must have access to the Commission's rationales and information supporting the proposal. However, these were often not readily available. The FTC's initial notices of rulemaking often contained conclusory or truncated discussions of the tentative legal theories, policy judgments, and factual assumptions underlying the proposals.

An early and clear articulation of the bases of a proposed rule is particularly necessary in FTC hybrid rulemaking because the broad "unfair or deceptive acts or practices" standard governing the exercise of the Commission's legislative rulemaking power does not in itself give sufficient specific structure to a proceeding. The proposed rules contained a wide variety of subject-matter and remedial provisions, and involved a number of different industries. Many rules were based on novel theories of unfairness or deception rather than on traditional principles. Some rules contained multiple theories of unfairness or deception or covered numerous and varied commercial practices. As a result, considerable confusion existed throughout the proceedings regarding the nature of the Commission's rationales and the elements of the proof necessary to support or refute the Commission's proposals.

The FTC staff investigative reports recommending that the Commission initiate rulemaking sometimes contained more detailed discussions of the theories and policy choices supporting recommended rules, but these were frequently not made publicly available early enough to be used by those preparing written comments or proposals

concerning disputed issues of material fact, nor did the staff reports provide clear connections between legal and policy conclusions and the factual information underlying the proceedings. In fact, many staff investigative reports contained little discussion of the evidentiary basis supporting the staff's proposal. There was often heavy reliance on postulated legal and policy considerations, rather than specific facts. Of course, many of the reports prepared in connection with pending rulemaking proceedings were written prior to passage of the Magnuson-Moss Act.

2. *Effective access to supporting materials.*—Several factors tended to cause an expansion in the volume of paper in the rulemaking proceedings. In many of the investigations originally designed to develop cease-and-desist actions against particular respondents rather than industry wide rules, compulsory process had been used to gather massive documentation concerning the practices of certain companies. In other proceedings, a wide variety of material of marginal significance had been collected as the staff educated itself about a particular industry. The Magnuson-Moss Act requirement that the Commission base trade regulation rules on a rulemaking record, together with the disclosure provisions of the Freedom of Information Act led the FTC staff to place in the rulemaking record all of this material that might possibly be relevant, whether or not the staff had any plans to rely on it.

This expansion of volume had two important consequences. First, it took time for the staff to collect the material and transmit it to the rulemaking record. Much material was made public too late to be used by participants submitting written comments or proposing disputed issues of fact for consideration at the oral hearings. Second, the records generated were too massive and poorly organized to be used effectively. Two rules (Credit Practices and Mobile Homes) have records of over 200,000 pages. In the 14 other proceedings commenced before April 1976, the records accumulated before April 15, 1979, range from a high of 110,695 pages to a low of 8,377 pages, and average 40,551 pages. (Only three of these proceedings are yet complete, of course.) This growth in volume was not matched by a compensating investment in resources necessary to organize and index the material so as to facilitate public use. The creation of sixteen large rulemaking records in a short period of time overtaxed the FTC's record management capabilities. Problems caused by the volume of material were compounded by a lack of central control over record organization and indexing. Presiding Officers and FTC rulemaking staff attorneys experimented with diverse organizing and indexing schemes, and the resulting lack of standardization further complicated and slowed the processing of documents.

The net result was that it in many situations became virtually impossible for a participant to determine with any confidence which material was relevant to or significant for any particular point raised by a proposed rule. This seriously undermined the concept that the basis of a rule should be tested.

3. *Availability of the pre-hearing comments.*—In theory, the pre-hearing written comments submitted by interested persons could provide a framework for subsequent stages of a proceeding by sharpening the issues, suggesting alternatives to agency assumptions, and delineating the central matters in dispute. In fact, these comments were rarely referred to at the hearings.

This was due partly to deficiencies in the record management system. The chaotic situation described above often led to substantial delays in placing written comments, as well as other materials, on the record. When the comments were incorporated into the record, shortcomings in the indexing or availability of records made it difficult or impossible to use them in a timely, efficient manner.

4. *"Discovery."*—In part because of the difficulties of identifying the key legal theories or policy assumptions and of locating crucial supporting material in the rulemaking records, and in part because counsel for some interested persons tended to treat the proceedings as the equivalent of multi-party adjudication, interested persons frequently filed a variety of discovery motions and Freedom of Information Act requests in an effort to obtain statements of the theories and information upon which the Commission intended to rely. The Commission has never clarified whether it regards discovery motions as a legitimate device in rulemaking proceedings, nor established any systematic procedure whereby participants can obtain an elaboration or clarification of the staff's legal and policy theories or compel the production of underlying materials. Requests for "bills of particulars," written interrogatories directed at the FTC staff and attempts to discover the staff's case at prehearing conferences have been uniformly rejected. Therefore, the participant's basic rights of access to FTC material have been defined by the Freedom of Information Act. Moreover, the agency complied with FOIA by placing large, undifferentiated masses of materials on the rulemaking record, a practice that does little to define the issues in a proceeding or to establish the relative importance of different pieces of information to the rulemaking proposal. At the same time, processing discovery requests and complying with FOIA has involved a significant drain on staff resources.

Similarly, the Commission has not established any systematic procedure whereby the staff can force an elaboration or clarification of other participants legal and policy theories, or, within the context of the rulemaking proceeding, compel the production of underlying materials. It has, however, confirmed the authority of the staff of the Bureau of

Consumer Protection to issue subpoenas independently of the Presiding Officer.

An additional discovery issue concerns the right of one non-FTC participant to persuade the Presiding Officer to subpoena records of another. As of April 15, 1979, such a subpoena has been issued on only one occasion, but the potential of such third party subpoenas to create delay and disincentives to participation could be significant.

5. *Designation of disputed issues.*—As the rulemaking scheme established by the Magnuson-Moss Act was implemented by the Commission's rules of practice, "disputed issues of material fact which are necessary to resolve" were identified before any hearing, and indeed even before the close of the initial comment period. As a means of limiting cross-examination at the oral hearings, this device proved unworkable. It required identification of highly specific issues at a time when there had been minimal definition of even the major issues in the proceeding. It required identification of factual disputes even before interested persons had finished submitting their initial data, views and arguments in prehearing comments. Finally, it required presiding officers to make complicated, important judgments before they had had time to master the subject matter, and in a context in which the interested parties had an incentive to advocate broad, vague designations that would avoid precluding cross-examination on any issue.

The result was that the designation of issues on which cross-examination might be allowed did little to focus the proceeding. If the statutory phrase "disputed issue of material fact * * * necessary to resolve" is to serve as a limitation on cross-examination, or as a means of focusing on crucial fact issues, then identification of fact issues must take place after the major issues in the proceeding have been made as clear as possible, and with reference to specific evidence previously entered into the rulemaking record.

6. *Conduct of cross-examination.*—Largely because the designation process failed to produce sets of precisely defined issues, the effort to use designation as a device for limiting cross-examination was abandoned in favor of a "freedom-for-time" policy. Group representatives and FTC staff could question witnesses on any points they wished, so long as they stayed within established time limits.

This "freedom-for-time" policy permits cross-examination to concentrate on policy or opinion rather than factual issues, and, because much of the testimony offered in the hearings consisted of repetitious opinion unsupported by specific factual data, such cross-examination has seldom produced useful factual information. It generally has involved a credibility attack on the witness or his testimony.

7. *Utility of oral hearings.*—Oral hearings generally were not used to refine or respond to points made in the prehearing written record; rather, they tended to become an independent stage of the proceedings.

This can be attributed to the fact that the prehearing phase did not produce an adequate identification of points at issue, and that Magnuson-Moss leaves debatable the Presiding Officer's authority to exclude the testimony of repetitive witnesses. In addition, the hybrid, partly adversary character of the proceedings, in which group representatives were given some of the rights of parties in trial-type proceedings while presiding officers were delegated broad authority to limit or control the group representatives' participation, produced some uncertainties and difficulties for the presiding officers in controlling the proceedings, and in some instances contributed to an antagonistic atmosphere at the hearings.

The Administrative Conference study has necessarily focused on the rulemaking proceedings begun in 1975 and 1976. None was commenced in 1977 until the Thermal Insulation Rule was noticed on November 18, 1977. The Conference does not at this time have extensive information on the Thermal Insulation Rule, the Children's Advertising Rule (noticed April 27, 1978), the Games of Chance Amendment (noticed October 19, 1978), or the Standards and Certification Rule (noticed December 7, 1978). In addition, the consultant's reports now available to the Conference cover the rulemaking proceedings only through the stages of investigation, initial and final notices of rulemaking, prehearing comment and oral hearing. Thus the post-hearing procedures have not been considered, and no recommendations concerning these procedures, or concerning the statutory scheme as a whole, can be advanced at this time.

One point deserves special emphasis. The Commission's approach to rulemaking has not been static. The Commission itself has recognized many of the problems discussed above, and has been experimenting with a series of measures designed to improve its rulemaking. For example, new procedural approaches are being tried in all four of the most recent rules. Commission awareness of the need for greater input from the Bureau of Economics has resulted in the creation of a new division of that Bureau to work exclusively upon consumer protection matters. Directives have been issued designed to make the initial staff reports more thorough and useful. Steps have been taken to increase the accessibility of rulemaking records by improving organization and indexing, and by making documents available on microfilm. Internal efforts to develop better rulemaking processes have resulted in the FTC's 1978 Operating Manual, which is cited at several places in the consultant's report as reflecting conclusions similar to those of the Conference study.

Thus, the recommendations set forth below are not intended to imply that the Commission has not recognized the problems or taken steps to alleviate them. They represent, rather, the Conference's current views on practices which will promote effective and efficient rulemaking under

Magnuson-Moss, including some already utilized or endorsed by the FTC.

The Conference does not recommend any revisions in the statute at the present time, though such recommendations may be forthcoming after completion of the supplemental report.

Recommendations

1. The Commission should include in the initial notice of proposed rulemaking a description of the theories and materials which it then considers relevant to the rulemaking, together with appropriate references to the rulemaking record, including materials both supporting and opposing any proposed rule. The notice should indicate with reasonable specificity both the issues upon which the Commission seeks comment and information, and the kinds of evidence or information that are likely to be valuable to the Commission's resolution of the issues.

2. At the time the notice of proposed rulemaking is published, the Commission, consistent with its present policy, should place in the rulemaking record, and index, the staff investigative report recommending rulemaking (which should contain the staff's analysis of the issues, a summary of the information considered significant by the staff, and the methods of analysis used by the staff) and all relevant information in the possession of the staff. Information exempt under the Freedom of Information Act may be withheld. Similarly, all relevant material developed by the staff after the notice is published should be promptly placed in the rulemaking record, and indexed.

3. To the extent feasible, and as early as practicable in the proceeding, the Commission should provide guidance to participants concerning suggested methods for the marshalling and presentation of information.

4. The Commission, to the extent feasible, should promote (but not require) the use of standard methods for the marshalling and presentation of information with respect to issues commonly recurring in trade regulation rulemaking proceedings.

5. In conducting investigations which may lead to trade regulation rulemaking, the Commission should experiment with techniques for eliciting increased information and views from the public, including the use of advance notices of proposed rulemaking with opportunity for public comment and meetings for conferences open to the public on adequate notice. The Commission should assure that its staff solicits the views of affected interest groups during the course of the investigation, including groups that might not otherwise participate.

6. Many issues that arise in the course of formulating rules pursuant to section 18 of the Federal Trade Commission Act require, or can

benefit from, the contributions of disciplines other than law. The Commission should continue its efforts to assure appropriate use, at all stages, of experts whose disciplines are relevant to consideration of the proposed rule, including economists, statistical analysts and consumer research specialists.

7. To avoid burdening the rulemaking record, the Commission, consistent with its present policy, should require that the staff maintain, separately from that record, a public file of related documents, collected and generated by it, that the staff, pursuant to procedures established by the Commission, has determined not to be relevant.

8. Proper handling of rulemaking records can greatly assist public participation in proceedings, reduce delay, and enhance the quality of decisions. The Commission should continue and intensify its efforts to improve public and staff access to the rulemaking record through upgrading of record management practices, storage and retrieval technologies, copying and microfilming capability, and record indexing and organization. The Commission should ensure that all materials in the rulemaking record are indexed as they are received, and that adequate facilities are provided for members of the public to inspect, copy, and work with the record.

9. The use of subpoenas should be restricted to the investigation conducted by the Commission staff to develop information relevant to the rulemaking, including information both supporting and opposing the rule. Once a hearing has been noticed, the subpoena power should be used sparingly, and, once a hearing has been commenced, should be used only with the approval of the Presiding Officer upon a showing of need.

10. In lieu of a discovery practice, the Commission should provide by rule that at a hearing or within a reasonable time thereafter the Presiding Officer, on his own motion or on that of the Commission staff or any other participant, may request the staff or any other participant at that hearing to clarify, elaborate or support any oral or written presentation then or previously made by such participant. The rule should also provide that failure to comply with such a request may result in the drawing of adverse inferences with respect to the presentation, or a reduction in the weight to be given to the presentation.

11. If a person appealing from the Commission's initial denial of a Freedom of Information Act request asserts that the information sought is desired for use in a pending rulemaking proceeding, the agency official handling the appeal should not affirm the denial on the basis of an exemption in that Act without first obtaining the views of the Presiding Officer in the proceeding as to the utility of that information, except where withholding the information is required by law. The Commission should adopt such amendments to its Freedom

of Information Act procedures as may be necessary to assure this consultation.

12. As a general practice the Commission, after the close of the first period of submission of written comments, should conduct a legislative-type hearing, following which it should determine whether there appear to be "disputed issues of material fact it is necessary to resolve." If it so determines, such issues should be designated with specificity, and a further hearing in accordance with section 18(c) of the Federal Trade Commission Act, should be held for the purpose of resolving them.

13. An oral hearing can serve any or all of at least four somewhat separate functions: (1) fact gathering; (2) fact testing; (3) assessment of the views of different segments of the public; and (4) clarification of positions and exchange of views on policies, values or desirable lines of inquiry. The fact testing function is performed in the section 18(c) hearing referred to in paragraph 12, above. The legislative hearings should be designed according to which of the other three functions is believed likely to predominate. For example, the clarification of positions and exchange of views on policies, values or desirable lines of inquiry may best be furthered by such informal devices as round-table or panel discussions.

14. The statutory phrase "disputed issues of material fact it is necessary to resolve" should be understood to mean only those issues (1) which are capable of being resolved as matters of fact, and (2) whose resolution is essential to the evaluation or formulation of a rule.

15. Cross-examination may not be necessary on a designated disputed issue of material fact. However, if the Commission determines to limit or deny cross-examination on a designated issue, it should state the basis for its decision.

RECOMMENDATION 79-2

DISPUTES RESPECTING FEDERAL-STATE AGREEMENTS FOR ADMINISTRATION OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM

(Adopted June 7-8, 1979)

Public assistance in the United States was originally exclusively a function of local governments. States first became involved by their establishment of institutions to accommodate particular categories of persons, e.g., the blind, the insane, the deaf, the aged. Early in this century many States established programs of cash benefit payments for needy mothers and aged persons. A federal role in public assistance did not develop until the Depression: first with a temporary program of grants-in-aid enacted in 1933; and then with a permanent program established in 1935 by the Social Security Act, under which the fed-

eral government was authorized to reimburse specified portions of the State and local public assistance payments for three categories of needy persons, the aged, the blind, and dependent children. A fourth category, the disabled, was added in 1951, and in 1965 Medicaid, a similar grant-in-aid program for the medically indigent, was established.

From 1936 to 1974 a series of Federal agencies exercised the Federal role which, pursuant to the pertinent titles of the Social Security Act, was to enunciate the eligibility conditions to be met by State public assistance programs (including substantive, procedural and administrative features) and to make payments by way of reimbursement to the States of statutorily stipulated fractions of public assistance expenditures under their eligible programs. The responsible Federal agency, since 1953 the Department of Health, Education and Welfare (HEW), exercised considerable influence over State public assistance programs through establishment of State program conditions and review of State program operations for purposes of determining the fact and amount of State reimbursement entitlement.

In 1972, Congress replaced federal grant-in-aid support for State programs of public assistance to the needy elderly, blind, and disabled with a federally administered cash benefit program for the same groups. This program is known as the Supplemental Security Income Program or SSI. The Federal-State grant-in-aid program for needy families with dependent children (AFDC) was left untouched by the transformation of SSI. (Proposals for and discussion of "welfare reform" usually refer to making a comparable transformation of AFDC; in 1972 such a proposal, the Family Assistance Program, was rejected by the Congress as it enacted SSI.)

State public assistance programs for the aged, blind, and disabled have not been entirely displaced by SSI, because the level of Federal SSI benefits (below what many States were paying under their predecessor programs) and the simplification of its benefit formula (as compared with prior State programs) leave substantial room or need for supplementary State assistance to these groups. As initially enacted, the 1972 SSI legislation encouraged States voluntarily to supplement the Federal SSI amounts, but subsequent amendments require them to do so in amounts based on their prior public assistance expenditures. (The requirements are imposed as a condition for continued receipt of Federal grant-in-aid support for State Medicaid programs.)

Federal administration of the SSI program is lodged in the Social Security Administration (SSA), a major operating element of HEW. SSA and a State may enter into an agreement for SSA to administer the State's supplementary benefits, and in such event SSA includes both the basic Federal SSI benefit and the State supplement in a

single check to the recipient. Strong fiscal inducements structured with the SSI program have led most States with significant supplements to enter such agreements.

To implement its role as administrator of State supplementary benefits, SSA developed a set of proposed model agreements which it distributed for consideration by the States through the American Public Welfare Association (APWA), which had contracted with SSA to serve as liaison with all the States. Through a process of negotiation over those model agreements with a committee established through APWA, SSA and that committee agreed upon the general terms and conditions which formed the basis for SSA's original agreements with the 31 States electing Federal administration of State benefits. (Some of those States have since withdrawn from Federal administration, and others have joined; currently 27 States have their supplementary benefits administered by SSA.) Similar negotiations over revised model agreements took place in 1974 and 1976. Overall this process was quite successful, yielding general terms and conditions (still called "model agreements") which reflected and responded to State interests and problems, as well as the Federal interest. While notice-and-comment rulemaking procedures of § 553 of the Administrative Procedure Act were utilized by SSA to establish by regulation some of the basic parameters of these Federal-State agreements, they were not followed in promulgating the general terms and conditions of those agreements, either initially or in subsequent revisions. Those provisions, as contained in the model agreements, deal with many important issues not covered by the regulations, including some of significant potential interest to supplementary benefit recipients. Combining notice and public comment procedures with the process of discussion with the States, through a representative committee, would assure individual States, beneficiaries and other interested persons and groups a full opportunity to present views upon proposed agreement terms and the agreement-formation process.

Shortly after the first agreements were executed and the SSI program was underway, serious disputes about the parties' respective responsibilities and liabilities arose. The novelty of the relationship coupled with the start-up difficulties of the program created a large initial volume of controversy and uncertainty over how these disputes should be handled. The statute makes no explicit provision for administrative or judicial resolution of such disputes. In the agreements, the "disputes" paragraphs and related provisions leave significant uncertain ties and deficiencies, which in turn generate substantial shortcomings in the dispute-resolution process.

The present "disputes" provision affords an opportunity for a hearing before the HEW Departmental Grant Appeals Board, but does not delegate to that Board the HEW Secretary's power of final de-

cision. Under the dispute-settlement procedures of Federal contracts, administrative finality ordinarily attaches only to determinations of an independent and reasonably expert decisionmaking body, such as a board of contract appeals, to which the Departmental Grant Appeals Board is analogous in the present circumstances.

The breadth of coverage of the disputes provision is subject to substantial and injurious uncertainty. While there are indications that the present provision may have been intended to cover most or all disputes regarding performance of the parties, language has been used which in other Federal contracts has consistently been more narrowly interpreted.

Additionally, desirable utilization of the disputes procedure has been impaired by the awkward operation of the liability provisions of the agreement, even where disputes under such provisions would clearly be covered by the established procedures. Numerous disputes involving large sums have been stalled, without effective access to the disputes procedure, because of insufficiencies of the basic liability provisions and the measurement systems to which they were keyed. States have extensively used self-help remedies, which might have been avoided if the provisions of the agreement had furnished a surer basis for prompt resolution of these disputes.

Recommendation

1. The process of negotiation and agreement between the Secretary of HEW on the one hand, and individual States desiring Federal administration of SSI supplementary benefits on the other, is conducted in substantial part on the basis of the general terms and conditions established by HEW. These general terms and conditions (sometimes called "model agreements") are in turn related to published regulations of HEW. Both the regulations and the general terms and conditions should be developed by a procedure that embraces both (a) discussions with a representative committee of State officials, of the type that led to agreement on successive versions of the general terms and conditions in 1973, 1974, and 1976, and (b) the notice and public comment procedures of 5 U.S.C. § 553. The notice of proposed rulemaking (or, in appropriate cases, an advance notice of proposed rulemaking) should precede the discussions with the committee of State representatives. This does not necessarily imply an added cycle of notice and public comment nor any diminution of HEW's flexibility in negotiation.

Since the current general terms and conditions have never been the subject of notice and public comment, and include several areas noted in paragraphs 2 and 3 below in which procedural improvements can be achieved, HEW should initiate a full review of them, utilizing the above procedures.

2. Consideration should be given through such procedures to a new agreement provision for measuring the respective liabilities of the Federal Government and of the States. In formulating such new provision, specific consideration should be given to (a) inclusion of liability standards and measurement systems that are generally acceptable to the States, (b) explicit establishment of the right of a State to seek any adjustment of liability that its own data (derived through the generally accepted systems) may indicate, with recourse to the contractual disputes procedure in the event SSA declines adjustment on the basis of such State data, and (c) possible procedures for separate treatment of liability for errors resulting from consistent SSA practices or policies that violate statute, regulation or agreement, as distinct from liability for random errors in general.

3. On the assumption that the agreements will continue to contain a provision granting dispute resolution authority to an official or officials in HEW, the provision should be amended (a) to encompass, without doubt or ambiguity, all disputes between the parties concerning performance of their respective obligations arising out of the agreement—including Federal claims of State noncompliance, (b) to assure prompt resolution of all disputes submitted pursuant to its terms, and (c) to provide that the last stage of the administrative dispute process is to be before the HEW Departmental Grant Appeals Board, which shall render an independent decision, based on a hearing and the record.

RECOMMENDATION 79-3

AGENCY ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES

(Adopted June 7-8, 1979)

The civil money penalty has become one of the most widely used techniques in the enforcement programs of Federal administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary function of compensating society for the harm caused by unlawful conduct.

Recommendation 72-6 urged that the advantages of civil money penalties would be best achieved through an "administrative imposition system" in which the agency would be empowered to adjudicate the violation and impose the penalty after a trial-type hearing, subject to "substantial evidence" judicial review. Such a system, it was stated, would avoid the delays, high costs, and jurisdictional fictions inherent

in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Department of Justice.

Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties have been widely recognized.

Experience has shown that agencies play a crucial role and exercise broad discretion in the administration of civil penalty programs, whether or not the statute in question authorizes an administrative imposition system. Agencies possessing such authority have found it efficient to try to resolve cases before the formal hearing stage, through settlement and negotiation. Those agencies not possessing administrative imposition authority operate under a wide variety of statutes: some make no express reference to an agency role in the penalty process, while others confer on the agency only a power to "assess" or to "mitigate" penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent *de novo* fact finding hearing by the court in a collection proceeding. Agencies typically exercise their statutory authority to "mitigate" in resolving contested penalty assessments prior to the initiation of formal enforcement action. In these recommendations the term "mitigation" refers to any informal process of resolving a contested initial penalty assessment.

Whatever the statutory framework, the enforcing agency typically makes the initial assessment, and provides a process for mitigation of the penalty. Thus, both where there exists administrative imposition authority and where such authority does not exist, agencies and respondents customarily utilize these initial assessment and mitigation processes to resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or a court collection proceeding.

These informal processes for the initiation and termination of civil penalty proceedings represent an area of previously unstudied and largely discretionary agency action. Appropriate standards and structures for the exercise of such discretion are needed to improve the consistency, efficiency and openness of agency assessment and mitigation processes.

The recommendations that follow focus on (A) the need for agencies to develop standards for determining penalty amounts, (B) agency procedures for initially assessing penalties, (C) agency mitigation procedures, and (D) the use by agencies of evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judicial review.

Recommendation

A. Standards for Determination of Penalty Amount

1. Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases. In establishing standards, agencies should specify the factors to be considered in determining the appropriate penalty amount in a particular case. To the extent practicable, agencies should specify the relative weights to be attached to individual factors in the penalty calculation, and incorporate such factors into formulas for determining penalty amounts or into fixed schedules of prima facie penalty amounts for the most common types of categories of violations. A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection. Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

2. Agencies should periodically evaluate the continuing effectiveness of their penalty standards. Such evaluations should be based upon the results of compliance surveys and internal audits of agency assessment and mitigation decisions as well as data on the nature and frequency of violations routinely generated by the agency's enforcement program.

3. Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements. Such an approach is especially desirable where adjudications that produce written decisions are rare.

4. Agencies should collect and index those written decisions made in response to mitigation requests or after agency assessment hearings, and make such decisions available to the public except to the extent that their disclosure is prohibited by law. Whenever a respondent cites a previous written decision as a precedent for the agency to follow in the respondent's case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

B. Initial Assessment of Penalties

1. Agencies should give adequate written notice to the respondent of the factual and legal basis for, and amount of, the penalty assessment.

2. Agencies should not mechanically assess variable civil money penalties at the statutory maximum if reliable evidence in their possession indicates the presence of mitigating factors. Nor, if they possess such evidence, should agencies assess at the statutory level fixed penalties which are subject to an express administrative "mitigation" authority.

3. The greater the degree to which an agency decentralizes its penalty assessment authority, the more it should structure the exercise of that authority by the use of highly specific standards. Agencies should not ordinarily delegate discretionary authority to assess civil money penalties to investigative personnel unless the delay inherent in review by an independent assessment official would materially impair the effectiveness of the enforcement process.

C. Mitigation of Penalties

Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level. It is nevertheless desirable that agencies establish fair and economical procedures whereby respondents may informally contest the initial assessment of civil penalties without the necessity of going forward to trial-type hearings. These procedures should be governed by the following principles:

1. Agencies should provide the respondent with a right to reply in writing to a penalty claim.

2. Agency staff should not refuse a reasonable request to discuss a penalty claim orally. But an informal conference need not be built into the process except in those categories of cases where the use of written communications is likely to prove inadequate because of such factors as the unsophistication of violators or the prevalence of factual disputes.

3. Agencies should consider providing an opportunity for administrative review of a decision denying a request for mitigation.

4. Agency decisions on mitigation requests should be in writing and should be accompanied by a brief indication of the grounds for the decision.

5. In regulatory programs typically involving the imposition of small penalties, agencies may appropriately rely most heavily on readily ascertainable standards of liability, fixed schedules of prima facie penalty amounts for the most common types of categories of violations, and highly objective inspection procedures. Opportunity for mitigation should be narrowly confined and mitigation requests entertained only if in written form.

6. In regulatory programs typically involving the imposition of large penalties, agencies may appropriately provide an opportunity to a respondent to present a request for mitigation, orally or in writing, request an oral conference thereon, receive a written decision, and sub-

mit a written petition for review of such decision or for compromise of such claim at a higher agency level.

D. Evidentiary Hearings

As expressed in Recommendation 72-6, it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA, 5 U.S.C. §§ 554-557, for the imposition of civil money penalties. Where its statute does not provide for such procedure but confers upon the agency authority to "assess" or to "mitigate" a penalty, particularly if the agency is required to conduct a "hearing," the agency should consider establishing such procedures by regulation, especially where by doing so a de novo proceeding upon judicial review could be avoided. Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for de novo judicial proceedings, the court should ordinarily utilize a limited scope of review of such agency action imposing civil money penalties.

RECOMMENDATION 79-4

PUBLIC DISCLOSURE CONCERNING THE USE OF COST-BENEFIT AND SIMILAR ANALYSES IN REGULATION

(Adopted June 7-8, 1979)

Federal agencies must frequently weigh competing health, safety, resource management, environmental, economic, and other societal interests when seeking to achieve a prescribed statutory objective. Wise decisionmaking presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other. To give structure to the exercise of this responsibility, agencies sometimes use "cost-benefit" or similar analytic approaches to organize available information to determine the consequences of possible courses of action in terms of their costs, risks and benefits. Such techniques seek to display the projected net effects of alternative courses of action and, when properly used, can assist the decisionmaker in deciding which of the alternatives is most likely to produce a desired result.

The following recommendation seeks to promote openness in the decisionmaking process, to ensure that agencies' analytic methods are sound and that their assumptions are known, so as to enhance public confidence in the soundness of conclusions finally reached. The recommendation is not intended to promote or to discourage the use of any single kind of analysis as a framework for agency decisionmaking, since this choice is normally a matter of agency discretion. The choice of analytic technique may depend on several factors, including the technical complexity of the problem, the magnitude of the impacts,

the time frame for agency action, and the extent to which quantification is possible for the specific costs and benefits to be considered. Any analysis, of course, should be viewed as an aid to rational decision-making, and not as an end in itself. The intent of the recommendation will be served by giving the public adequate advance notice of the agency's proposed methodologies, either generically or by means of special notice in a particular proceeding.

Recommendation

1. Agencies, as general policy though not necessarily by binding rule, should adopt the practice of addressing, in their public notices of particular proceedings in which cost-benefit or similar analyses are to be used, the following points:

a. Any statutory or other legal requirements pertaining to or affecting the agency's conduct of cost-benefit or similar analyses in the proceeding.

b. The particular analytic technique to be followed by the agency (e.g., cost-benefit analysis, cost-effectiveness analysis, qualitative or non-numerative balancing), with a description of the method, including an identification of any analytic models preliminarily determined to be used.

c. Any factual assumptions or preliminary findings of the agency to be utilized in the analyses.

d. The agency's techniques for assessing and revealing uncertainties in its quantitative estimates, and making explicit the range of error associated with particular quantitative estimates.

e. The agency's methods for evaluating intangible costs and benefits, for discounting future costs and benefits, and for taking account of distributional effects arising under the selected methodology, to the extent such issues are involved in the analyses.

f. The stages of the proceeding at which the cost-benefit or similar analyses will be conducted and the results considered.

g. The extent and nature of public participation in the design, conduct, and evaluation of the cost-benefit or similar analyses.

h. The extent and manner in which the public is to be accorded access to assumptions and information used in the analyses.

A statement of the weight given the cost-benefit or similar analyses, and a description of any revisions of assumptions or preliminary

findings, should be included in the final agency determination and made available to the public.

2. Where a pattern of recurring decisional problems exists for which a particular analytic technique is appropriate, the agency should consider adopting a generic regulation or policy statement describing the use of that technique with respect to those problems. Agencies that have varied statutory functions may suitably formulate separate regulations or policy statements for different areas of statutory responsibility. Generic regulations or policy statements so adopted may permit the use of different techniques on an ad hoc basis where the agency determines that to be necessary. Any such regulations or policy statements should address the points listed in paragraph 1.

RESOLUTION CONCERNING THE FUTURE ROLE OF THE ADMINISTRATIVE CONFERENCE

(Adopted June 8, 1979)

BE IT RESOLVED that it is the sense of the Assembly that the Chairman and the Council should prepare proposals or reports, appropriate for discussion or action by the Assembly at one or more Plenary Sessions within a year, concerning (1) the future role and character of the Administrative Conference, (2) methods of undertaking projects leading to recommendations, (3) participation of members in Conference activities, (4) implementation of Conference recommendations, and (5) related matters they consider important for Assembly consideration.

RECOMMENDATION 79-5

HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION—ADMINISTRATION OF THE PROGRAM TO REIMBURSE PARTICIPANTS' EXPENSES

(Adopted December 14, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93-637, which established procedures for the Federal Trade Commission's promulgation of trade regulation rules, also authorized the Commission to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in those proceedings. The statute (15 U.S.C. § 57a(h)(1)) provides that the Commission may reimburse the expenses of:

any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a

fair determination of the rulemaking proceeding taken as a whole and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.

The present Recommendation is addressed to relatively technical questions that have arisen in connection with the Commission's administration of this expense reimbursement program, and not to the issue of whether a reimbursement program is desirable. Since the Commission has completed only three Magnuson-Moss rulemaking proceedings, assessments of the value or the overall impact of this program cannot yet be made. The Conference does anticipate that these larger questions will be addressed in its final report on Magnuson-Moss rulemakings at the Federal Trade Commission.

The Commission, lacking specific statutory guidance and the benefit of other agencies' experience, progressed slowly, through trial and error over a 2-year period, in developing its practice for administering its expense reimbursement program. The efforts of the Commission in this regard are more fully described in the report on which this recommendation is based, and merit consideration by other agencies establishing such programs. The Commission's present system of administration appears to implement faithfully and efficiently the reimbursement program established by the statute, and the conclusions embodied in the recommendations set forth below are drawn from an examination of its experience.

Recommendation

1. The Conference recommends that the Federal Trade Commission, in its implementation of the expense reimbursement program established by the Magnuson-Moss Act, continue to observe the following principles, which in large part reflect the Commission's current practice.

(a) Interested members of the public should be given an opportunity to comment on proposed regulations and guidelines for administering any expense reimbursement programs.

(b) The availability of funding should be set forth in the principal agency documents announcing the initiation of a proceeding, such as published notices of proposed rulemaking and press releases. The announcements should advise where further information on the funding program can be obtained. In addition, affirmative steps, such as direct notification of industry organizations, consumer groups, and other voluntary associations likely to be interested, should be taken to inform potentially interested members of the public of the availability of reimbursement funds. Lay-language booklets and brochures explain-

ing the funding program and the procedures for obtaining reimbursement should be prepared and distributed.

(c) Filing dates for reimbursement applications should be established and announced well in advance. Since, however, participatory needs or desires may change by reason of the evolving nature of rule-making proceedings, applications filed after these dates should be considered to the extent feasible.

(d) Applications for reimbursement should be acted on expeditiously in order to allow applicants adequate time to prepare for participation in the proceeding.

(e) Advance payments to recipients should be available where necessary to allow adequate preparation for participation.

(f) Responsibility for granting or denying applications should not be given to personnel in the office within the agency that has direct responsibility for developing the staff position in the proceeding for which reimbursement is sought. However, these persons and others familiar with the proceeding (including presiding officers) should give their views to the persons with responsibility for reimbursement decisions on such matters as the relevance of the applicant's proposal, the applicant's interest in the proceedings, and the relationship between the applicant's proposal and the views and information expected to be otherwise presented in the proceeding. Wherever feasible, those with responsibility for reimbursement decisions should also be given access to experts, who are independent from any office within the agency that has direct responsibility for developing the staff position in the proceeding, on matters such as survey design and other research activities proposed by an applicant.

(g) When the character of an applicant as a representative organization is important to the decision to authorize reimbursement, the persons with responsibility for reimbursement decisions should consider the nature of the relationship—e.g., whether the applicant receives contributions from members or constituents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding. The agency should also require the recipient to advise its members or constituents of its position.

(h) It should be recognized that a legislative standard which limits reimbursement to applicants who cannot afford to pay the cost of participation involves consideration of the applicant's priorities and other spending decisions, its prospects for other funding, and similar questions.

(i) Applicants should be advised in writing of the reasons for grant or denial of their applications. All advisory letters should be indexed and made publicly available.

(j) Programs for auditing the performance of reimbursed entities, including both an examination of their use of funds received and an assessment of the quality of their work product, should be established. Sufficient resources should be allocated to ensure that audits are completed on a timely basis, so that supplemental or subsequent funding decisions can be informed by the results of the audits.

(k) An expense reimbursement program can serve several broad purposes—such as broadening the sources of the information presented (or developed by cross-examination) in a proceeding, improving the quality of the information in the record of a proceeding, and providing for participatory democracy by encouraging the expression of public views. The Magnuson-Moss Act does not specify which of those objectives are to predominate in a reimbursement decision. The degree of emphasis placed on one or another of these purposes can lead to different decisional criteria. The agency should specify those purposes that it recognizes and the factors that it will consider in determining whether a reimbursement application might further those purposes.

2. The Conference recommends the principles set forth in paragraph 1 for the consideration of agencies establishing expense reimbursement programs for rulemaking proceedings, and, as applicable, for the consideration of the Congress, if it were to formulate a statutory program for reimbursing the expenses of participants in rulemaking proceedings.

3. A congressionally established expense reimbursement program, if one were to be created, should expressly provide for the funds and staff positions necessary to implement the program, including provisions for administration, outreach activities, and financial and quality-control audits.

4. If the Congress were to establish an expense reimbursement program, it should specifically authorize the agency to make advance payments to funded participants if the agency does not clearly have that authority.

RECOMMENDATION 79-6

ELIMINATION OF THE PRESUMPTION OF VALIDITY OF AGENCY RULES AND REGULATIONS IN JUDICIAL REVIEW, AS EXEMPLIFIED BY THE BUMPERS AMENDMENT

(Adopted December 14, 1979)

Symptomatic of concern that reviewing courts do not probe as deeply as they should into the legality of agency action and that, as a consequence, administrative rules may be too broad in their reach is the so-called Bumpers Amendment to S. 1477, the Federal Courts Improvement Act of 1979.

The Bumpers Amendment in its principal operative part amends 5 U.S.C. § 706 to insert after the first sentence of the section a sentence that reads, "There shall be no presumption that any rule or regulation of any agency is valid," and a court in which the validity of a rule or regulation is drawn into question "shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown."

For reasons stated below the Conference opposes the enactment of the Bumpers Amendment. Concern about the broad substantive reach of the administrative rules of a host of agencies cannot be effectively addressed by legislatively imposing across-the-board procedural rules for judicial review.

1. The wording of the amendment raises numerous interpretative questions that are compounded rather than answered by its legislative history. Previous versions of the amendment proposed to insert the phrase "*de novo*" into the first sentence of Section 706, as follows: "To the extent necessary to decision and when presented, the reviewing court shall (*de novo*) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Although that change was not a part of the amendment as approved by the Senate, statements of its sponsors nonetheless indicate that they intend by the amendment to eliminate the doctrine under which courts reviewing agency action pay deference to the agency's views concerning interpretation of the statute it administers. Because of the discrepancy between this history and the terms of the amendment as adopted, which contains no words that explicitly indicate the intent to eliminate the deference doctrine, the amendment in its present form would generate troubling problems of construction.

2. The text of the amendment does clearly reflect the sponsors' desire to eliminate any presumption of validity of an agency rule or regulation. In actuality, no presumption of validity today shields a rule or regulation from the close scrutiny to which judicial review now subjects agency action. Courts may properly give weight to agency expertise in some circumstances, as, for example, where complex scientific or technical issues are involved.

3. The amendment would require the Government to establish the validity of a challenged rule or regulation "by a preponderance of the evidence shown." No need has been shown for such an alteration of what has been understood to be the burden of persuasion in judicial proceedings in which the validity of Federal regulations may be drawn into question. The alteration would probably foster additional litigation over the validity of regulations, and no substantial public benefit could be expected to flow from the additional litigation. Moreover, the use of the term "preponderance of the evidence" is inappro-

priate because a court, when passing on the validity of a regulation, does not receive evidence but, rather, hears argument. At worst the wording might be read to require a reviewing court to make an independent, fresh assessment of the circumstances and data underlying the rule. On that construction, courts would find themselves obligated to redecide factual (and policy) issues affecting the validity of rules or regulations in all the myriad areas of governmental activity and not merely to decide whether rules or regulations are rationally supported. This would be a burdensome task for which courts are not suitably staffed or well-equipped by training or experience.

4. The amendment uses the phrase "rule or regulation." "Rule" by itself is defined in the Administrative Procedure Act, 5 U.S.C. § 551 (4), but "regulation" is not, thereby creating the potential for considerable litigation to establish the meaning of the entire phrase. Furthermore, because the amendment adds to the Government's burden in defending the validity of rules or regulations while it leaves unchanged the burden in defending challenges to the validity of other types of agency action, the amendment might have some tendency (the magnitude depending on the issues held to be encompassed by "validity") to cause agencies that have freedom of choice to proceed case-by-case rather than by adopting rules of general applicability. Any such discouragement of rulemaking would be undesirable. See Conference Recommendation 71-3.

Recommendation

1. Congress should not enact the so-called Bumpers Amendment to Section 706 of the Administrative Procedure Act or, by any similar legislation, at this time alter or reverse any presumption of validity that attaches to agency rules or regulations.

2. An across-the-board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted, would be unwise, and Congress should not enact legislation precluding such deference.

RECOMMENDATION 79-7

APPROPRIATE RESTRICTIONS ON PARTICIPATION BY A FORMER AGENCY OFFICIAL IN MATTERS INVOLVING THE AGENCY

(Adopted December 14, 1979)

Restrictions on post-employment activities of former Government employees may be necessary in order to protect the Government's interest in confidential information made available to its employees, to guard against the appearance of conflict of interest on the part of its employees, and to minimize the possibility that a departed employee

might be able to exert undue influence on the decisions of his former colleagues. However, such restrictions impose burdens on departing employees and, to the extent they make public employment less attractive, they burden the Government itself. Consequently, such restrictions should not be drawn more broadly than necessary to deal with the dangers realistically presented.

Recommendation

1. The problem of post-employment activities of former federal employees is too complicated, and the distinctions between permissible and impermissible conduct too fine, for fair and effective enforcement by criminal sanctions in most cases. The primary enforcement tool for 18 U.S.C. § 207 should be the administrative remedies provided by subsection 207(j), with criminal penalties reserved for clearcut and egregious violations.

2. Section 207 of title 18 of the United States Code should be amended to limit the restrictions on post-employment activities to the following:

(a) The present permanent bar (18 U.S.C. § 207(a)) on representation of a private party in any "particular matter involving a specific party or parties" in which the employee participated "personally and substantially" on behalf of the Government should be retained. However, there should be no restriction on representation, except as provided in paragraph 2(b), with respect to other matters such as those which were pending under the employee's official responsibility but as to which he had no personal and substantial participation.

(b) The present 1-year "cooling off period" (18 U.S.C. § 207 (c) and (d)) on personal advocacy by former high-level personnel before their former agency is a reasonable compromise and should be retained. The 1-year ban should reach only personal attempts to influence the agency, not "aiding or advising" private colleagues or clients, or obtaining information from the agency.

(c) Agencies should be authorized to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs, but the proposed amended section 207 should preempt the rules of professional organizations or courts imposing additional post-employment restrictions.

3. Regardless of what action Congress takes on the above proposals, the disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the mat-

ter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus "screened" should be submitted by a partner in the firm, not as a basis for Government approval, but to assure that the firm has in fact recognized the issue and taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the "screening" arrangement affords adequate protection to its interests.

BYLAW AMENDMENTS ON MEMBER ATTENDANCE

(Adopted December 13, 1979)

Summary

Pursuant to section 6 (D) of the Conference's bylaws, the proposed bylaw amendments are being submitted by the Council for the consideration of the membership at the December Plenary Session.

The amendments deal with the question of member attendance at committee meetings and plenary sessions. Section 2(A) of the bylaws would be amended to add a new subparagraph (2) stating that it is each member's obligation to "devote personal and conscientious attention to the work of the Conference," including regular attendance at plenary sessions and committee meetings. It states further that where a member has missed two consecutive plenary sessions or three consecutive committee meetings, the Chairman shall inquire into the reasons for nonattendance, and if he does not receive a satisfactory explanation, he shall take the additional steps set out. The last sentence of the new paragraph emphasizes that the attendance standard stated is a minimum and must not be construed as full discharge of a member's responsibilities.

(The Council has also acted to clarify what is meant by attendance at plenary sessions. Heretofore, any member present on either day of a 2-day session was recorded as present. Henceforth the roll will be read on each day, and it will be expected that members attend both days.)

In addition, section 2 (D) of the bylaws, which at present permits participation by alternates at committee meetings, but without the privilege of voting, would be amended (a) to require that the alternate designated be "suitably informed," and (b) to emphasize that use of an alternate will not be accepted as fulfillment of the member's obligation of attendance, as set forth in paragraph A (2).

Background

These proposed amendments stem from the work of the Special Committee on the Role of the Administrative Conference. One of the

subjects assigned for the consideration of the Committee was the participation of members in Conference activities.

The Conference was conceived and established as a membership organization, and its success depends on the active interest and personal participation of its members. Yet because its members, public and Government, are busy people with competing demands on their time, maintaining a desirable level of attendance at Conference meetings has long been a problem. According to our figures attendance at recent plenary sessions has averaged two-thirds to three-quarters of the entire membership. Since not all members counted as present attend both days' sessions, the percentage of members present at any particular time is even lower. Committees have on occasion had difficulty transacting their business at scheduled meetings because of members' absences.

At the Seventh Plenary Session in June 1972, the Conference considered and rejected bylaw proposals which would have permitted Government members to designate alternates with voting privileges at committee meetings and (in one version) at plenary sessions. Instead, the Conference adopted a resolution stating:

"The successful functioning of the Conference requires that its members regularly attend and fully participate in the meetings of committees and the plenary sessions of the Conference. * * * (A)ll members, whether from agencies or the public, should regard their membership as involving a commitment to regular participation in the work of the committees and the plenary sessions of the Conference."

The proposed amendment is consistent with and carries forward the philosophy expressed in the 1972 resolution. Its intent is to bring more forcefully to the members' attention their obligation of personal participation, and to strengthen the hand of the Chairman in dealing with members whose attendance record indicates neglect of their Conference responsibilities. Obviously, the standards for participation set out in the proposed bylaw are somewhat arbitrary, as any quantitative standard must be, but it is believed that they constitute a reasonable basis for requiring the Chairman to inquire as to the member's reasons for nonattendance. The bylaw leaves it to the Chairman to decide whether the explanation is satisfactory.

BYLAW AMENDMENTS ON MEMBER ATTENDANCE

1. Section 2(A) of the bylaws is amended to designate the present text as paragraph (1) and to add the following paragraph:

"(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive plenary sessions or three consecutive committee meetings, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall:

(a) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention; or (b) in the case of a non-Government member, deny reappointment to such member. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations."

2. Section 2(D) of the bylaws is amended to read as follows:

(D) ALTERNATES

"Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph A(2) of this section."

RESOLUTION ON AN ENHANCED ROLE FOR THE ADMINISTRATIVE CONFERENCE IN PROCEDURAL REFORM

(Adopted December 13, 1979)

The Administrative Conference was established to provide a means for public officials and experts selected from private life to engage in cooperative study of the efficiency, fairness, and adequacy of the administrative procedures of Federal agencies, and to develop recommendations for improvement. Its jurisdiction is limited to questions of procedure as opposed to questions of substantive policy. As an independent and policy-neutral body, balanced in membership and arriving at its conclusions through a consensus process, the Conference has acted as counsellor rather than as commander. The Conference, in its 12 years of experience, has successfully performed the work assigned by the Administrative Conference Act.

I. The Structure of the Administrative Conference

A deliberative body, whose members are drawn from Government and from private life, continues to be needed to address problems of administrative procedure and to develop recommendations for improvements. Widespread dissatisfaction with the performance of Government is reflected in Congressional and Executive impatience with established patterns, and in receptivity to proposals for innovation. A forum where the processes of public administration can be appraised dispassionately, and suggested changes can be weighed knowledgeably by a broadly based and highly respected body, is markedly desirable at this time. The Administrative Conference uniquely serves that purpose.

Beyond this, the Administrative Conference can and should work more actively with the Federal agencies, to improve their regulatory procedures, reduce delay, increase openness and public participation in decisionmaking, and otherwise assure fair and effective administration of Government programs. As is implicit in several recent proposals in the Congress and the Executive Branch, the Conference should play an expanded role in the Federal Government's efforts to assure fairness and efficiency.

The present organizational structure of the Conference—Chairman, Council, Assembly—is well suited to this enlarged responsibility. Some of the additional functions contemplated for assignment to the Administrative Conference can be carried out through processes culminating in Assembly action. Several other functions by their nature would have to be performed by an enlarged Office of the Chairman. The judgment of the Chairman should as appropriate be exercised in consultation with the Council, and should be informed by and subject to the entire body of recommendations and other actions of the Assembly.

The numerous and diversely experienced membership of the Conference, through its deliberative processes, tests and refines proposals for procedural improvements, thus enhancing the quality and acceptability of all the Conference's work. Retaining the membership component of the Conference will create substantial benefits at only modest cost, since members are not compensated for their services. Legislative proposals to eliminate the Assembly and to concentrate entire power in a Chairman and a small group of official counsellors are unwise.

II. Assignments of Additional Responsibilities to the Administrative Conference

A. The following general principles should govern additional assignments of responsibilities to the Administrative Conference and to its Chairman.

1. To preserve the independence, policy-neutral character and overall effectiveness of the Administrative Conference, its responsibilities should continue to pertain to matters of procedure, broadly construed to include those aspects of agency organization and management that relate to the fair and efficient conduct of administrative proceedings, and judicial review of agency action.

2. The Conference's functions should continue to be recommendatory, consultative, and evaluative. They might well include special oversight responsibility for selected procedural statutes of Government-wide applicability.

3. The Conference should be empowered to employ its resources selectively, with appropriate attention to concerns and priorities expressed by the President and the Congress, on projects and activities that may best contribute to the improvement of Government processes.

B. The Assembly favors enhancing the role of the Administrative Conference, if adequate resources are available, by the assignment to it of—

1. Special responsibility for preparing advisory guidelines for the implementation of Government-wide procedural statutes, for counseling agencies concerning means for fulfilling their responsibilities under those statutes and guidelines, and for overseeing and appraising, on a selective basis, agencies' performance under those statutes and guidelines;

2. Similar responsibility in connection with a statutory program for funding public participation in agency proceedings, if such a program were to be enacted;

3. Responsibility for approving categories to be used by agencies in collecting statistics on their proceedings, for inclusion in reports on their regulatory activities;

4. Responsibility for analyzing on a selective basis reports of agencies' regulatory activities, in order to identify procedural problems;

5. Responsibility for designing methods, if needed, for reconciling overlapping, duplicative, or conflicting regulations, or for seeking adjustments of problems created by such regulations;

6. Responsibility for formulating selected model rules for adoption by agencies to govern their procedures, if the Congress determines this to be an advisable undertaking;

7. Responsibility for commenting on agency procedures and on proposed agency procedural rules, and for testifying or commenting on aspects of proposed legislation affecting administrative procedure;

8. Responsibility for participating, through membership on the Administrative Committee of the Federal Register, in the oversight of the Office of the Federal Register;

9. Responsibility for developing criteria and procedures for selecting and evaluating administrative law judges.

III. Undesirable Enlargement of Administrative Conference Responsibilities

A. The Administrative Conference should not be assigned routine monitoring responsibilities, such as reviewing and reporting on all agencies' annual reports concerning their regulatory activities.

B. The Administrative Conference should not be assigned responsibilities in the area of substantive policy, such as coordinating policy on substantive issues or reviewing agency decisions to renew or to terminate advisory committees.

C. Operating responsibilities should be assigned to the Conference only on the basis of a strong demonstrated need and after consideration of the impact of a given assignment on the Conference's ability to carry out its other activities. Examples of operating functions the

Assembly believes to be undesirable additions to its primary responsibilities include—

1. Administering programs for funding public participation in agency proceedings, including any determination of the amounts or recipients of awards in particular cases;
2. Performing the publishing functions of the Office of the Federal Register, or preparing index systems;
3. Selecting or evaluating individual administrative law judges;
4. Administering programs for paperwork reduction or for coordinating or clearing agency information gathering;
5. Handling and resolving individual complaints of agency failure to comply with required procedures. (The Conference should, of course, continue to consider complaints as a source of information for use in determining appropriate subjects for general inquiry.)

IV. Term of the Chairman

In order to maintain and enhance the Conference's unique status as a forum where the processes of public administration can be appraised dispassionately, and weighed by a knowledgeable, broadly based and informed membership, the Conference recommends that the Chairman continue to be selected on the basis of expertise and leadership, and that the term of the Chairman's office continue to be unrelated to that of the President of the United States.

V. Communication of this Resolution

The Chairman is directed to represent actively the foregoing views of the Conference by all appropriate means to any Committee or Member of Congress, or any Executive branch agency, which is considering or advocating any legislative initiative that proposes to address the role, functions, character or status of the Conference or its Chairman.

RESOLUTION CONCERNING CONGRESSIONAL TERMINATION OF PENDING ADMINISTRATIVE PROCEEDINGS AT THE FEDERAL TRADE COMMISSION

(Adopted December 14, 1979)

The Conference is aware of recent legislative proposals to terminate numerous ongoing rulemaking and adjudicative proceedings at the Federal Trade Commission. The Conference takes no position with regard to the merits of those proceedings. However, the Conference wishes to express its concern about the precedent which would be set by any premature legislative intervention in administrative proceedings. Such intervention precludes orderly development and consideration of the complex issues involved and undermines respect for the administrative process. Absent compelling circumstances or revision of the underlying substantive statute, congressional termination of pending administrative proceedings is undesirable.

RESOLUTION IN TRIBUTE TO JUDGE HAROLD LEVENTHAL
(Adopted December 13, 1979)

Judge Harold Leventhal served the Administrative Conference of the United States as the representative of the United States Judicial Conference for more than ten years. The wisdom and insight that he brought to the proceedings of the Conference will be acutely missed by its members and its staff.

Judge Leventhal was undeniably one of the nation's great appellate Judges. He not only helped to decide hard cases; he made law that will last. Many of his opinions in administrative law cases will be landmarks for years to come.

He was our teacher, our colleague and our friend. We will miss him.

Therefore, be it resolved, that the Assembly of the Administrative Conference mourns the passing of its member, the Honorable Harold Leventhal, and dedicates this, the Twentieth Plenary Session, to his memory.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE

(As revised Dec. 13, 1979)

SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. §§ 571 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

SECTION 2. MEMBERSHIP

(A) GENERAL

(1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive plenary sessions or three consecutive committee meetings, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (a) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention; or (b) in the case of a non-Government member, deny reappointment to such member. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(B) TERMS OF NON-GOVERNMENT MEMBERS

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year

intervals from June 30, 1970. No more than 10 percent of such members shall at any time be in continuous service beyond a third term.

(C) ELIGIBILITY AND REPLACEMENTS

(1) A member designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and redesignations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(D) ALTERNATES

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph A(2) of this section.

SECTION 3. COMMITTEES

The following shall constitute the standing committees of the Conference:

1. Committee on Agency Decisional Processes;
2. Committee on Agency Organization and Personnel;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grants, Benefits and Contracts;
5. Committee on Informal Action;
6. Committee on Judicial Review;
7. Committee on Licenses and Authorizations;
8. Committee on Ratemaking and Economic Regulation; and
9. Committee on Rulemaking and Public Information.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

SECTION 4. LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, Federal agencies, and professional associations which are not represented on the Conference. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

SECTION 5. AVOIDANCE OF CONFLICTS OF INTEREST

(A) DISCLOSURE OF INTERESTS

(1) Non-Government members may be deemed to be special Government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201–224 of title 18 U.S.C., in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with part III of Executive Order 11222, as amended, or any successor Presidential or statutory requirement. Without conceding the correctness of the view that non-Government members are special Government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or Executive order, each member, public or governmental shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in paragraph (B) of this section, members may vote

or participate in matters before the Conference without additional disclosure of interest.

(B) DISQUALIFICATIONS

(1) In accordance with 18 U.S.C. § 208 a member shall not, except as provided in paragraphs (B) (2) or (3) of this section, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this paragraph (B) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (B) (1) of this section, a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any Federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. § 208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. § 208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

SECTION 6. GENERAL

(A) MEETINGS

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) Members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under considera-

tion, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(B) QUORUMS.

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(C) SEPARATE STATEMENTS

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(D) AMENDMENT OF BYLAWS

The Conference may amend the bylaws provided that 30 days notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(E) PROCEDURE

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 88-499, August 30, 1964, 78 Stat. 615, as codified by Public Law 89-554, September 6, 1966, 80 Stat. 388, as amended by Public Law 95-293, June 13, 1978, Title 5 U.S.C., Chapter 5, Subchapter III, Sections 571 through 576.1

§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) “administrative program” includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule-making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) “administrative agency” means an authority as defined by section 551(1) of this title; and

(3) “administrative procedure” means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575 (b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of

information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposals so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firms, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devices, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b));

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedures; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

To carry out the purposes of this subchapter, there are authorized to be appropriated sums not to exceed \$1,700,000 for the fiscal year ending September 30, 1979, \$2,000,000 for the fiscal year ending September 30, 1980, \$2,300,000 for the fiscal year ending September 30, 1981, and \$2,300,000 for the fiscal year ending September 30, 1982.

